

4627

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA : 13-CR-607

-against-

US District Court
Central Islip, NY

PHILLIP A. KENNER a/k/a
PHILIP A. KENNER, and
TOMMY C. CONSTANTINE a/k/a
TOMMY C. HORMOVITIS,

Defendants.: June 23, 2015

- - - - - X 10 am

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

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United States Attorney
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Brooklyn, New York 11201
By: JAMES MISKIEWICZ, ESQ.
SARITA KOMATIREDDY, ESQ.
United States Attorneys

For the Defense:

RICHARD D. HALEY ESQ.
For Defendant Kenner

ROBERT LaRUSSO, ESQ.
ANDREW L. OLIVERAS, ESQ.
For Defendant Constantine

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Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

Dominick M. Tursi, CM, CSR
Official US District Court Reporter

1 (Call to Order of the Court. Appearances stated
2 as indicated above.)

3 (The following ensued in the absence of the
4 jury.)

5
6 THE COURT: Good morning. Are we ready to go?

7 MR. MISKIEWICZ: Yes, your Honor.

8 MR. LaRUSSO: Yes, your Honor.

9 MR. HALEY: Yes.

10 THE COURT: Bring in the jury.

11 Mr. Kenner, please come up to the stand.

12 (The following ensued in the presence of the
13 jury.)

14
15 **PHILLIP A KENNER**

16 called by the Defense, having been previously
17 duly sworn/affirmed, continued testifying as
18 follows:

19
20 THE COURT: Good morning, members of the jury.
21 It is good to see you all again.

22 As you know, when we ended yesterday, Mr. Kenner
23 was on cross-examination. This morning we will continue
24 from that point.

25 Mr. Kenner, I remind you that you are still

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1 under oath. Do you understand?

2 THE WITNESS: Yes, sir.

3 THE COURT: Go ahead, Mr. Miskiewicz.

4 MR. MISKIEWICZ: Thank you, your Honor.

5

6 CROSS-EXAMINATION (Continued)

7 BY MR. MISKIEWICZ:

8 Q. Mr. Kenner, when we broke yesterday I was asking you
9 questions about your interest in Cabo San Lucas.

10 Just to backtrack a little. At page 4618 of the
11 transcript I asked you:

12 *Question: You own 39 percent of Diamanté Cabo*
13 *San Lucas to this day, don't you?*

14 *Answer: Yes, sir, I do.*

15 And that is still your testimony, correct? You
16 own 39 percent of Cabo San Lucas, right?

17 A. I believe I do.

18 Q. And there were some questions about documentation.

19 Let me show you what I'm marking for
20 identification as Government Exhibit 4502.

21 Do you recognize 4502?

22 A. Yes, I do.

23 Q. What do you recognize it to be?

24 A. The operating agreement for Baja Ventures 2006 LLC.

25 Q. And that is the LLC that you created as a vehicle for

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1 which to invest in Mr. Jowdy's Diamanté Cabo San Lucas
2 resort. Is that correct?

3 A. That is not correct.

4 Q. Okay. Why did you create the LLC?

5 A. I did not create Baja Ventures 2006 LLC.

6 Q. Who did create it?

7 A. It was created by I believe Bill Najam and/or Larry
8 Markowitz.

9 Q. Okay. But you don't have any question that this is
10 in fact the limited liability company agreement for Baja
11 Ventures 2006. Do you.

12 A. No. It appears to be.

13 MR. MISKIEWICZ: The government offers into
14 evidence Exhibit 4502.

15 MR. HALEY: No objection on my part, judge.

16 MR. LaRUSSO: No objection, your Honor.

17 THE COURT: 4502 is admitted.

18 (Government Exhibit 4502 in evidence.)

19 BY MR. MISKIEWICZ:

20 Q. Very briefly. The first page indicates: Limited
21 Liability Company Agreement of Baja Ventures 2006 LLC.
22 And according to this, the agreement was in effect dated
23 March 2, 2006. Right?

24 A. That's what it says.

25 Q. But when was it?

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1 A. The top of the letter says dated March 2, 2006.

2 It is appears I signed it on or about the 6th of
3 March.

4 Q. Okay. Is this what you were referring to? This
5 signature page?

6 A. Yes, sir.

7 Q. That is your signature. Right?

8 A. Yes, sir, that is.

9 Q. And you are relying on the 6th of March because of, I
10 assume -- correct me if I'm wrong -- because of a fax
11 date. Is that the reason?

12 A. Yes, sir.

13 Q. Okay. And according to this, which is what describes
14 who is a member and what capital contributions were made,
15 you are a 100 percent member of that LLC. Right?

16 A. Yes, sir.

17 Q. And it says here you contributed \$2.5 million.

18 Where did you get that money from?

19 A. The \$2.5 million was originally loans that were made
20 to Ken Jowdy by Jere Lethinen and Joseph Stumple in the
21 summer of 2005.

22 In or about the time of this document being
23 created by Mr. Markowitz and Mr. Najam, Ken Jowdy had
24 informed me that he was not going to be paying back, not
25 only the Hawaiian loans but the loans to Mr. Stumple and

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1 Mr. Lethinen at that time. So as a preventative measure
2 when Mr. Jowdy reneged on the original loan agreement with
3 Mr. Lethinen in the summer of 2005, I signed a debt
4 agreement with both Mr. Stumple and Mr. Lethinen to secure
5 their funds behind Jowdy's promise to repay them, and as a
6 result a few more than steps occurred. And then on
7 February 23, 2006, Mr. Najam initiated the formation of
8 Baja Ventures 2006 to hold my equity. Which was not the
9 original plan.

10 Q. Okay. I show you what is marked for identification
11 as Government Exhibit 4503.

12 See if you recognize this.

13 A. I have reviewed it.

14 Q. Do you recognize that document?

15 A. Not specifically.

16 Q. Had you ever seen that documented before?

17 A. I don't recall specifically if I have or not.

18 Q. Turning your attention to the third-from-the-last
19 page.

20 Do you see any signatures on that page?

21 A. Those are both my signatures.

22 Q. And that is the signature page that accompanies the
23 rest of the document, is it not?

24 A. Yes, I believe it is.

25 Q. Do you have any doubt that you signed this document

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1 at some point?

2 A. No, sir.

3 MR. MISKIEWICZ: The government moves for the
4 admission of 4503.

5 MR. HALEY: Your Honor, the testimony is that he
6 signed the document. My only concern is, at least at this
7 point, been able the testify that he saw this document,
8 and the test for authenticity. I guess that would be my
9 only objection.

10 THE COURT: There is sufficient authentication
11 by his testimony that that he signed it. Whether he
12 remembers it or not, it still is permitted to come in.

13 MR. HALEY: Okay.

14 MR. LaRUSSO: No objection.

15 THE COURT: 4503 is admitted.

16 (Government Exhibit 4503 in evidence.)

17 BY MR. MISKIEWICZ:

18 Q. Sir, directing your attention to the first page,
19 entitled Pledge and Securities Agreement, dated March 10,
20 2006, made by Ken Jowdy, Baja Ventures 2006.

21 That is the LLC we are talking about in
22 Government Exhibit 4502?

23 A. Yes.

24 Q. Diamanté Properties LLC.

25 What is Diamanté Properties LLC?

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1 A. I believe --

2 Q. Actually, let me, just to save some time.

3 Diamanté Properties LLC, is that essentially the
4 parent company under which all the Cabo San Lucas LLCs
5 function?

6 A. Not that I'm aware of.

7 Q. CSL Properties 2006, KAJ Holdings LLC. All of them
8 are pledgors. And they are pledging something. And the
9 rest of this is favor of Lehman Brothers. Correct?

10 A. That is what it appears to be.

11 Q. You knew that Lehman Brothers, just before Lehman
12 Brothers came in and began to fund the Hawaii properties
13 that are the subject of this indictment, Lehman Brothers
14 also, prior to that, funded Ken Jowdy's resort project in
15 Cabo San Lucas. Correct?

16 A. I wouldn't refer to it as Ken Jowdy's resort in Cabo
17 San Lucas. But Lehman Brothers did fund it for us.

18 Q. I apologize. It's not just Ken Jowdy's. It's yours
19 as well. Correct?

20 A. It is also a number of investors as well.

21 Q. But you will agree that Lehman Brothers funded Cabo
22 San Lucas just a few months before the closing on the
23 Hawaiian properties which are the subject of this
24 indictment.

25 A. Five months prior.

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1 Q. And in this security agreement, which has your
2 signature as a pledgor in behalf of two companies, Baja
3 Ventures -- that is the one where you had the 100 percent
4 interest. Correct?

5 A. Yes, sir.

6 Q. -- and CSL Properties 2006.

7 Who is CSL?

8 A. Those are my client investors.

9 Q. And those are your clients; for instance, like
10 Mr. Berard and others, who put money into Cabo San Lucas?

11 A. I believe Mr. Berard is one of the investors. Yes.

12 Q. And others. Right?

13 A. Yes. He is not the only investor.

14 Q. At or about the same time, you had clients invest in
15 cash into Hawaii, they were also, at your recommendation,
16 investing other cash in this property. Is that right?

17 A. It was several years apart.

18 Q. Well, it took several years for both Hawaii and Cabo
19 to get going; that is, to get Lehman Brothers. Correct?

20 A. No, that's incorrect.

21 Q. All right. What period of time? Or isn't it true,
22 sir, that between 2004 and 2006, your clients were
23 investing both in the Hawaii project and in this project.

24 A. Between 2004 and 2006 my clients were investors in
25 both projects. That is correct.

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1 Q. Now, you said that, with respect to the Baja Ventures
2 LLC, the reason it was created is because Mr. Jowdy had
3 already informed you that he wasn't going to pay back the
4 money previously loaned to him?

5 A. That is correct.

6 Q. And when you say he wasn't going -- he was telling
7 you this, that he have wasn't going to pay back the money,
8 you mean the money that your hockey player clients loaned
9 through their lines of credit in the Hawaii Northern Trust
10 lines of credit.

11 A. That's part of it. But your statement was incorrect.

12 Q. Okay. But was partly true. Some of that 5 million
13 came from their lines of credit? Or all of their 5
14 million came from their lines of credit? Which is it?

15 A. Which 5 million are we speaking about? With respect
16 to the destination.

17 Q. Mr. Kenner, you said yesterday, I thought, that
18 during the Hawaii project inception, about \$5 million out
19 of lines of credit went to Hawaii -- I'm sorry, went to
20 Mexico from the Northern Trust line of credit.

21 Do you recall saying that?

22 A. No. Not completely from the lines of credit.

23 Q. Well, how much from the lines of credit did go to
24 Mexico?

25 A. My best guess would be between \$1 million and \$1.5

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1 million.

2 Q. So your testimony earlier in this cross-examination
3 is in error.

4 A. No. I believe you were asking how much money had
5 gone to Mexico to Mr. Jowdy on behalf of the Mexican
6 projects, and I believe my answer was approximately \$5
7 million. I don't think you specifically asked what came
8 directly out of the lines of credit.

9 Q. Where did the rest of the \$5 million come from?

10 A. I believe some of the funds came from financing from
11 the Centrum loan and then some of the funds came from
12 investments that either Mr. Kaiser and/or myself put into
13 Hawaii project.

14 Q. The Centrum loan?

15 A. Was that a question?

16 Q. Yes.

17 A. I'm not sure I understand the question.

18 Q. You sent money from the Centrum loan to Mexico?

19 A. Yes.

20 Q. So wherever the money came from -- by the way. There
21 are records that support what you are saying?

22 A. I believe we have already seen them on some of the
23 government charts.

24 Q. But do you have wire-transfer records, documentation
25 showing that on behalf of your clients you were sending,

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1 whether it was \$5 million or \$1.5 million to Mexico?

2 Do you have anything supporting that?

3 A. I have received, through government production, bank
4 records that were turned over to my attorney and
5 subsequently turned over to me in pretrial to review, that
6 represent all of the bank transfers.

7 Second to that, I had also filed a lawsuit in or
8 about 2008 --

9 Q. Mr. Kenner --

10 A. -- against Mr. Jowdy and laid out each and every one
11 of the transactions that were given to Mr. Jowdy --

12 MR. MISKIEWICZ: Your Honor --

13 MR. HALEY: Your Honor, I have an objection.

14 THE COURT: Wait. Don't speak over him. The
15 court reporter can't get it down.

16 And Mr. Kenner, confine yourself to the question
17 that he was asking you. He was asking about
18 documentation. Does the rest of your answer relate to
19 documentation?

20 THE WITNESS: Yes, it was.

21 THE COURT: Go ahead. Finish your answer.

22 A. The second half of the answer -- I apologize for
23 speaking over, your Honor.

24 The second half of the answer was that in or
25 about 2008 I filed a lawsuit that we saw yesterday, Little

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1 Isle IV, Ula Makika, and myself against Ken Jowdy and the
2 State of Arizona which laid out each and every of the wire
3 transfers that were sent to Mr. Jowdy from the Hawaiian
4 entities.

5 BY MR. MISKIEWICZ:

6 Q. That was the lawsuit that was dismissed. Right?

7 A. That was the Arizona lawsuit that was dismissed.

8 Q. And it was dismissed because you were ordered by the
9 court to provide discovery on an expedited fashion to
10 substantiate the claim that that note that is now a Kenner
11 Exhibit was true; not a forgery. Right?

12 MR. HALEY: I object.

13 THE COURT: Sustained.

14 MR. HALEY: Thank you.

15 BY MR. MISKIEWICZ:

16 Q. Well, were you -- isn't it true, sir, that you
17 refused to provide discovery in that lawsuit?

18 A. That's completely inaccurate.

19 Q. Isn't it true, sir, that you repeatedly delayed and
20 avoided submitting to a deposition in that lawsuit?

21 A. That's also inaccurate. The deposition was taken
22 before the date that was ordered by the court.

23 Q. And isn't it true, sir, that ultimately it was
24 dismissed, not at your doing but by the court?

25 A. The court dismissed the case. That's correct.

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1 Q. Now, 4503. This document is -- withdrawn.

2 4502, the Baja Ventures Limited liability
3 company. Your testimony earlier was this was at or about
4 the time that Mr. Jowdy indicated to you that he was not
5 going to repay the loans that had been made by the hockey
6 players. Correct?

7 A. His testimony, related to Baja Ventures 2006, was
8 with respect to the loans that he had taken from Jere
9 Lethinen and Joseph Stumple in the summer of 2005 and had
10 informed me in or about February 19, 2006, he was not
11 going to be repaying at the close of the Cabo loan.

12 Q. What about the hockey players? Was he going -- did
13 he also indicate he wasn't going to be paying back the
14 hockey players, whether it is 5 or 1-1/2 million that they
15 loaned him?

16 A. It was \$5 million that was loaned from the Hawaiian
17 entities.

18 And he did inform me in or about that same day
19 that Lehman Brothers would not let him collateralize his
20 equity position, which was supposed to be 20 percent at
21 the time, to collateralize and receive the \$7 million
22 payout so he could pay out the Hawaiian loan in full.

23 Q. My question to you is, during this time in or about
24 March of 2006, is this when he told you he wasn't going to
25 repay?

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1 A. It was on or about February 19 he told me that he was
2 is not going to pay back either the Hawaiian loans or the
3 loans to Mr. Lethinen or Mr. Stumple, which resulted in
4 the Baja Ventures LLC being created.

5 Q. And isn't it true, sir, that in, for instance, Kenner
6 Exhibit 93, this is the letter I think you referred to
7 yesterday as not the state of the union, you don't say
8 anything about that to your members in Little Isle IV,
9 that Ken Jowdy isn't going to pay you back? Do you?

10 A. This is three months after Mr. Jowdy told us he
11 wasn't going to pay us back. And I informed each and
12 every one of the members.

13 But this in fact is a disclosure letter related
14 to the joint venture that we did with Lehman Brothers in
15 Alan Warden and Windwalker.

16 Q. Where do you disclose that the man you just gave 5
17 percent into Na'alehu Ventures is welching on what you
18 claim to be a loan that he owes your clients. Not your
19 clients; his clients.

20 Where do you disclose that in this letter?

21 A. This letter was a disclosure letter with respect to
22 the joint venture agreement we were doing with Windwalker
23 and Lehman Brothers and had nothing to do with the actual
24 business affairs, the total business affairs of Little
25 Isle IV.

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1 Q. You don't think your clients would have wanted to
2 know in this letter?

3 A. They all new.

4 Q. How? By calling them?

5 A. Each one of them was aware.

6 Q. You are a financial advisor dealing with millions of
7 dollars of money. You are saying the only way you notify
8 these people, your clients, was on the telephone?

9 A. And in-person meetings.

10 Q. And then you had this opportunity several weeks --
11 several months, July of '06, after Mr. Jowdy allegedly
12 says he is not repaying your clients, to document that,
13 and you don't say a word about it.

14 A. None of it was allegedly.

15 Mr. Jowdy did inform me on or about February 19.
16 There is email traffic that I have in evidence that would
17 substantiate the dates and the specific actions that were
18 taken by Mr. Jowdy and Mr. Najam and Mr. Markowitz related
19 to the closing of the Cabo San Lucas deal.

20 Q. Well, emails can related to the closing. What about
21 emails saying: *Hey, Phil. I'm not paying you back.*

22 Do you have an email like that?

23 A. We didn't need to have one like that because the rest
24 of the emails substantiated that.

25 Q. Well, my question to you is, there is no email from

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1 Mr. Jowdy even referencing the loan, let alone saying he
2 wasn't going to pay. Is that correct?

3 A. Prior to February 19 --

4 Q. Sir, I think --

5 MR. HALEY: I object.

6 MR. MISKIEWICZ: -- there is a yes or no in that
7 question.

8 MR. HALEY: I object.

9 THE COURT: That is a yes-or-no question.

10 Mr. Kenner, if you cannot answer yes or no, tell
11 him you can't answer yes or no.

12 He is asking you whether there is an email that
13 says something like that. Is there an email that says
14 something like that or not?

15 THE WITNESS: Could he restate the question
16 please?

17 THE COURT: Do you want to restate the question?
18 Or do you want it read back?

19 MR. MISKIEWICZ: May we have it read back.

20 (The record was read.)

21 THE WITNESS: Maybe you could restate it. I'm
22 not sure I completely understand that.

23 BY MR. MISKIEWICZ:

24 Q. Is there an email from Mr. Jowdy saying he wasn't
25 going to pay you back whatever he borrowed?

Kenner - Cross/Mr. Miskiewicz

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1 A. I don't believe there is.

2 At that point in time he was still paying it is
3 back.

4 THE COURT: Mr. Kenner, if there is a further
5 explanation, Mr. Haley gets to redirect after Mr.
6 Miskiewicz is done.

7 THE WITNESS: Okay. Okay.

8 THE COURT: If he asks you whether something
9 happened or not, you don't have to provide an explanation
10 for why it did or did not happen. He is just asking you
11 whether it happened or not. Okay?

12 THE WITNESS: Okay.

13 BY MR. MISKIEWICZ:

14 Q. Briefly we talked about this yesterday. You did find
15 it necessary to mention Ken Jowdy being instrumental in
16 obtaining the Lehman Brothers loan for Hawaii, in this
17 paragraph that I'm pointing to. In your exhibit Kenner
18 93. Right?

19 A. Yes. I read the second sentence yesterday.

20 Q. And the last sentence in that bullet point says: I
21 expect both of them to provide valuable service going
22 forward as advisors with regard to the development of the
23 parcels in our relationship with Windwalker.

24 And the parcels are Little Honu-apo, Honu-apo,
25 Waika Puna, et cetera. Correct?

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1 A. Those are the parcels. Correct.

2 Q. That's the Hawaiian land venture. Right?

3 A. Yes, it is.

4 Q. And even though you say at this time he has already
5 notified you he is not going to repay any loans made to
6 him with player money in Mexico, you provided him
7 nevertheless, because he has been so instrumental, a 5
8 percent interest in what was the players venture in
9 Hawaii. Right?

10 A. That is correct. He was given a 5 percent interest
11 at the request of Mr. Masoud Bahti.

12 Q. Well, whoever Mr. Bahti is --

13 A. Mr. Bahti was the Lehman Brothers --

14 Q. I'm not asking. I haven't finished my question.

15 Whoever he is, ultimately it was up to you to
16 decide, as managing partner of Little Isle IV and
17 subsequently Na'alehu, it was up to you to decide whether
18 or not to cut him in. Right?

19 A. Yes, sir. Mr. Bahti was the lender of Lehman
20 Brothers.

21 I could have chosen not to acquiesce to his
22 request in lieu of perhaps not getting the funding.

23 Q. So you are saying that Mr. Bahti extorted you to give
24 Ken Jowdy a 5 percent interest?

25 A. I didn't say that.

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1 Q. He forced you?

2 A. Mr. Bahti told me that since we were all partners in
3 Cabo San Lucas and that he was going to be our funding
4 source for any and all ventures going forward, he thought
5 it would be a good idea to include Mr. Najam and Mr.
6 Jowdy in the Hawaii partnership.

7 Q. And you agreed with that. Right?

8 A. Yes, sir, I did.

9 Q. But Mexico and Hawaii were two separate ventures with
10 presumably two entirely different potential -- in fact,
11 they were very different in terms of what ultimately
12 happened. Isn't that right?

13 A. I'm not sure I understand in what content.

14 Q. You are saying that this guy Bahti, whoever he is,
15 from Lehman Brothers, said: You know, you got this thing
16 in Mexico and you got this thing in Hawaii. You're all
17 one big family. Why not cut Mr. Jowdy in for a 5 percent
18 piece.

19 Isn't that what he said?

20 MR. HALEY: I don't believe that is what he
21 testified to. I object.

22 THE COURT: Can you answer that, Mr. Kenner?

23 THE WITNESS: I don't believe that is accurate.

24 BY MR. MISKIEWICZ:

25 Q. But you did cut Mr. Jowdy in for 5 percent several

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1 months after he told you that he wasn't going to pay back
2 the loans already made to him in Mexico. Yes or no? I
3 think that is a yes-or-no.

4 A. I'm not sure I can answer that with a yes or no.

5 Q. And as to 4502, now in evidence, explain this again.
6 This was created because Mr. Lethinen and Stumple, who had
7 loaned money to Jowdy, were now not going to get paid
8 back.

9 I don't understand why you would have needed a
10 limited liability company under those circumstances. Why
11 don't you explain it.

12 A. Sure. I would be glad to.

13 In the summer of 2005 Mr. Jowdy approached me
14 again about incremental loans to be made specifically to
15 him. And one was for a million five from Mr. Lethinen
16 which Mr. Jowdy and Mr. Najam documented with a loan
17 letter.

18 Second, Mr. Stumble also provided a second loan
19 to Mr. Jowdy at that time for about \$956,000. Mr.
20 Lethinen's loan was a 30-day 10 percent loan that was
21 supposed to be repaid by the end of the summer 2005, and
22 it was not, by Mr. Jowdy. Mr. Jowdy had represented that
23 he was selling another piece of real estate in Georgia
24 that was owned by him. When that apparently fell through,
25 Mr. Jowdy told me he couldn't pay back Mr. Lethinen that

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1 summer. So I told Mr. Lethinen as a further security
2 measure I would give him a portion of my ownership through
3 a debt agreement, which I signed with Mr. Lethinen in the
4 summer to give him further security as my client that his
5 loan to Mr. Jowdy would be fine.

6 At that time although Mr. Stumple's loan fell
7 under the 15 percent loan arrangement we had made with
8 Hawaii, I felt that it was my obligation, since it was for
9 the same purpose, for to give Mr. Stumple the same deal
10 that I did Mr. Lethinen. So I signed the same debt
11 arrangement with Mr. Stumple. Mr. Jowdy assured me,
12 though, still that by the time we closed the Cabo San
13 Lucas deal, he would be able to repay not just the
14 Hawaiian loans but also his advances from Mr. Stumple and
15 Mr. Lethinen, which are documented through bank records as
16 well.

17 Prior to February 19 of 2006, being I had every
18 indication from Mr. Jowdy that the loans would be repaid
19 as collateralized equity by Lehman Brothers, and I had
20 intended to take my ownership as evidenced by a myriad of
21 email correspondence between myself and the Cabo lawyers
22 in my own personal entity called Guide Dog LLC.

23 On or about February 19, Mr. Jowdy informed me
24 that Lehman brothers decided through their committee and
25 through Masoud Bahti that they would not collateralize his

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1 equity upon closing, that they had a new rule at the firm
2 that they would not be doing that any longer, so Mr. Jowdy
3 told me he would be unable to repay the entire \$7 million
4 Hawaii loan or be able to repay Mr. Stumple and
5 Mr. Lethinen at that point in time.

6 Between the 19th and 23rd of February 2006, in
7 discussions with Bill Najam and myself through email, we
8 decided to start a brand new entity called Baja Ventures
9 2006 which I had previously named on the agreements with
10 Mr. Stumple and Mr. Lethinen in the summer of '05 as a
11 security measure for both of those individuals.

12 At that point Mr. Najam and Mr. Markowitz
13 started the LLC Baja Ventures 2006 to further securitize
14 the two interests.

15 Q. Thank you.

16 A. You are welcome.

17 Q. And as a result of all of that, Mr. Jowdy allegedly
18 did not want to repay or indicated he could not repay --
19 became a 100 percent member of Baja Ventures, that is what
20 securitized, as you say, the Lethinen and Stumple loan.
21 Right?

22 A. I'm sorry. Could you repeat that?

23 Q. Well, as a result of Lethinen and Stumple being told
24 we are not paying you, meaning Jowdy or Jowdy's partners
25 were not paying Lethinen and Stumple back, you then with

Kenner - Cross/Mr. Miskiewicz

4650

1 Mr. Najam created Baja Ventures 2006.

2 A. With Mr. Najam and Mr. Markowitz. That's right.

3 Q. But you are 100 percent owner of the company; not
4 them.

5 A. That is correct.

6 Q. And then as a result of all of that, looking at
7 Schedule I of 4503, that is how you got 40 percent almost,
8 or 39 percent of Diamanté Cabo San Lucas. Right?

9 A. Not necessarily.

10 Q. Well, so what you are saying is, Mr. Jowdy indicated
11 he wasn't going to repay two of your clients, you formed
12 an LLC called Baja Ventures, and then that Baja ventures
13 ends up with just one percentage less in ownership equity
14 interest in Cabs San Lucas than Mr. Kenneth A Jowdy.

15 Isn't that what these documents reflect?

16 A. That is an inaccurate reflexion of what occurred.

17 Q. By the way, you have you have testified about the
18 Jowdy loan?

19 A. Yes.

20 Q. The decision to take some money from the Hawaii
21 venture. You testified about it before. Correct?

22 A. Yes, sir, I have.

23 Q. And you testified about it in the lawsuit that you
24 initiated against Christine Myrick, your former employee.
25 Correct?

Kenner - Cross/Mr. Miskiewicz

4651

1 A. I don't recall that deposition.

2 Q. Well, do you recall what you said when you were asked
3 who you ever spoke to about loaning money to Ken Jowdy?
4 Do you remember?

5 A. I don't recall.

6 Q. Do you remember when you said those conversations
7 began?

8 A. I don't recall what I said during that deposition.

9 Q. Let me show you what we are going to mark as Myrick
10 1.

11 Showing you Myrick 1 for identification. And
12 I'm going to ask that you, I direct your attention to page
13 starting at 144 through 146. Then I will have some
14 questions.

15 (There was a pause in the proceedings.)

16 THE COURT: Mr. Kenner, are you on the right
17 page? He is asking about page 144.

18 THE WITNESS: Yes, sir. It begins at 144.

19 MR. MISKIEWICZ: It is only an excerpt, your
20 Honor. I didn't include the entire deposition.

21 A. I wasn't going to make my way through to 144.

22 MR. HALEY: Your Honor, may I simply stand next
23 to Mr. Kenner as he looks at the exhibit?

24 THE COURT: Sure.

25 MR. HALEY: Thank you.

Kenner - Cross/Mr. Miskiewicz

4652

1 (There was a pause in the proceedings.)

2 MR. HALEY: Mr. Miskiewicz, which pages? All of
3 them?

4 MR. MISKIEWICZ: I think I suggested.

5 THE COURT: He said 144 to 146.

6 MR. HALEY: Thank you, judge. Okay, I have
7 looked at them. Thank you.

8 BY MR. MISKIEWICZ:

9 Q. So does that refresh your recollection as to what you
10 said when you were deposed in the Myrick lawsuit on April
11 21, 2009, in the State of California?

12 A. Yes, it does.

13 Q. And when you were asked those questions, that was one
14 of the first times you had been confronted with questions
15 about how money ended up in Mexico.

16 That was one testifying the first depositions in
17 a long range of depositions you have participated in,
18 right?

19 A. I don't recall if this was the first one.

20 Q. Okay. And isn't it true, sir, you were asked who did
21 you notify and speak to about making a loan to Ken Jowdy,
22 and, first of all, you said Mr. Jowdy approached you in
23 October of '04. Isn't that right?

24 A. That sounds about right.

25 Q. And a moment ago you said you were talking to

Kenner - Cross/Mr. Miskiewicz

4653

1 Mr. Jowdy about loans in '05?

2 A. Unfortunately as I sit here today, we were speaking
3 with Mr. Jowdy about loans for a number of years.

4 Q. And you were asked who did you talk to and you said
5 some of my partners I believe. Right?

6 A. That is correct.

7 Q. And the only partners you could think of was John
8 Kaiser.

9 A. That is not correct.

10 Q. Well, do you name anybody else? Like Mr. Stumple or
11 Mr. Lethinen or any of the other people who testified in
12 this case as among those who you notified about the loan?

13 A. The word *notified* isn't used in here at all.

14 Q. I see.

15 A. It is line three.

16 Q. Well, sir, isn't it true that in this deposition you
17 were asked who did you speak to, not *notify*, about the
18 loan? And do you remember what you said?

19 A. John Kaiser.

20 Q. And you were asked: Anyone else? And what did you
21 say?

22 A. Not that I recall.

23 Q. And this is 2009. Presumably you would have had a
24 better -- withdrawn.

25 No further questions on this issue.

Kenner - Cross/Mr. Miskiewicz

4654

1 In Kenner Exhibit 93, there is no reference to
2 Tommy Constantine, is there?

3 A. Not that I recall.

4 Q. Prior to the date of this, or right at about the date
5 of this, July 21, 2006, Little Isle IV, Ula Makika, had
6 sent millions, or well over a million, approximately 1.3
7 million, to Tommy Constantine's CMG company. Constantine
8 Management Company. Correct?

9 A. Pursuant to the funding consulting agreements.
10 That's correct.

11 Q. And just so we are clear. You have seen this in
12 evidence, Government Exhibit 41, when Mr. Petrellese was
13 up here testifying, about a number of summaries tracing
14 money.

15 Do you recall that?

16 A. I don't recall.

17 Q. Do you recall that testimony?

18 A. Not specifically. No, sir.

19 Q. You don't recall specifically Government Exhibit 41.

20 But you don't disagree with its finding that,
21 for instance, Constantine Management Group, between
22 12/1/04 and 3/31/06, right about the time of Kenner 69,
23 received from Little Isle, Little Isle IV Ventures, net,
24 almost a quarter of a million dollars during that period
25 of time. Right?

Kenner - Cross/Mr. Miskiewicz

4655

1 A. I don't recall specifically but if that is what his
2 bank records assimilated, I would agree with it.

3 Q. And in addition to that, Ula Makika, which, again,
4 that was a company you controlled, right?

5 A. Prior you had mentioned Kenner Exhibit 69. I wasn't
6 familiar with that. I apologize.

7 Q. I'm sorry. I misspoke. Kenner 93.

8 A. Okay.

9 Q. This thing. And during the same period, 12/1/04 to
10 3/31/06. See that up there?

11 A. Tommy Constantine.

12 Q. Right. Constantine Management Group received 16
13 deposits from Ula Makika.

14 That is your company, one of your LLCs, correct?

15 A. Yes, sir, that is one of the Hawaiian entities.

16 Q. You are controlled it. Right?

17 A. Yes, sir. I controlled that.

18 Q. You were the managing partner.

19 A. I was the managing member. That's right.

20 Q. You controlled the bank account. Right?

21 A. Yes, sir, I did.

22 Q. Nobody else.

23 A. Nobody else.

24 Q. And 16 deposits were made to Constantine Management
25 Group for a net of 1.197 million. Right?

Kenner - Cross/Mr. Miskiewicz

4656

1 A. That sounds about accurate.

2 Q. Now, this is up to March 31 of '06. That is before
3 Urban Expansion, before Mr. Grdina got involved. Is that
4 correct?

5 A. That is not correct.

6 Q. Well, 1.3 million is before Urban Expansion?

7 A. I don't know the distribution dates to Constantine
8 Management Group, but 3/31/06 is not before the Urban
9 Expansion loan.

10 Q. Okay. So are you saying that this 1.3 million that
11 we just saw summarized during that period of time would
12 include Urban Expansion money? Or do you know?

13 A. I think the total was 1.197 that you showed me,
14 million dollars.

15 Q. Right. But then you also, through Little Isle IV,
16 sent almost a quarter of a million dollars in addition to
17 that.

18 A. That may have been prior.

19 Q. But you don't remember?

20 A. I don't recall the specific order, but it would make
21 sense to me that it would have been prior to the Ula
22 Makika distributions.

23 Q. Very quickly, my question is again, in this Kenner
24 93, although you talk at length about Mr. Jowdy, although
25 you provide Mr. Jowdy and his company a 5 percent interest

Kenner - Cross/Mr. Miskiewicz

4657

1 in the players Hawaii deal, you don't make any mention of
2 the significant role Mr. Constantine had made to justify
3 \$1.3 million in payments to him, do you?

4 A. The representation inside the disclosure letter was
5 not a recap of everything that had gone on with Little
6 Isle IV from inception to that date.

7 Q. So that would be a yes: The name Tommy Constantine
8 appears no place in this letter to the members of Little
9 Isle IV?

10 A. I did not see Mr. Constantine's name in that
11 disclosure letter.

12 Q. Now, I believe you testified that at some point there
13 was a modification of the Little Isle operating agreement
14 to enable it to make loans outside of Hawaii.

15 Didn't you stay that yesterday on direct?

16 A. I believe there were several modifications of the
17 original bylaws of Little Isle IV from its inception in
18 December 2003 through the Little Isle IV operating
19 agreement that was provided to us during the Lehman
20 closing.

21 Q. And Kenner 25. Is this the agreement or the
22 modification of the bylaws that you say permitted Little
23 Isle IV to make investment opportunities outside of
24 Hawaii?

25 A. Could I see the entire document for my recollection,

Kenner - Cross/Mr. Miskiewicz

4658

1 please?

2 Q. Sure.

3 A. Thank you.

4 Q. You are welcome.

5 (There was a pause in the proceedings.)

6 A. I have reviewed this.

7 (Continued on the following page.)

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Kenner - cross/Miskiewicz

4659

1 Q. Is that the bylaw that permits Little Isle IV to loan
2 money outside of the Hawaii venture?

3 A. Both myself, Chris Manfredi and John Kaiser believe
4 that the 2003 bylaws, which were our initial bylaws,
5 permitted lending in any context in the special projects
6 section, which I believe this one -- this was, I believe,
7 our second bylaws signed in -- by me in early 2004, also
8 maintains that same special projects section in Article
9 10, but this is not the one we were referring to
10 yesterday.

11 Q. No, it isn't. It's Kenner 217, right?

12 A. I'm not familiar with all the exhibits by number.

13 Q. Kenner 217, special project, Article 7, says the
14 managing member of Little Isle IV -- that's you, right?

15 A. Yes, sir.

16 Q. -- will be authorized to invest in any real estate
17 projects or project that are deemed appropriate by the
18 managing member and in the best interest of the LLC.

19 That means not just Hawaii, whatever you deem to
20 be appropriate?

21 A. I'm not sure where you are reading from.

22 Q. It's a document you offered, Kenner 217.

23 A. I'm looking at Kenner Exhibit 25 right here.

24 Q. Turn to the second page where it says "projects."

25 MR. HALEY: For clarity of the record, which

Kenner - cross/Miskiewicz

4660

1 exhibit?

2 THE COURT: 217.

3 MR. HALEY: Thank you.

4 A. Kenner Exhibit 217. Okay.

5 Q. Did I read that accurately?

6 A. Managing member of Little Isle IV will be authorized
7 to invest in any real estate project that are deemed
8 appropriate by the managing member and in the best
9 interest of the LLC. Managing member, at their sole
10 discretion, can engage in outside ventures deemed to be in
11 the best interest of the LLC, including but not limited to
12 other private equity funds and lending opportunities.

13 Q. That's what you rely upon, and it's dated September
14 1, 2004, that's what you rely upon as the basis for saying
15 Little Isle IV was permitted to make loans to Ken Jowdy,
16 if not other people, right?

17 A. On September 1, 2004, John Kaiser and myself signed
18 off on this new operating agreement, but I also believe
19 there was one other section that also specifically allowed
20 lendings.

21 Q. In that agreement or some other agreement?

22 A. In this agreement.

23 Q. Okay. Assume for the purpose of my next question
24 there is such a provision in there.

25 A. There is.

Kenner - cross/Miskiewicz

4661

1 Q. Okay.

2 A. I found it.

3 Q. That wasn't what the bylaws originally said for
4 Little Isle IV in Government -- or I should say Kenner
5 Exhibit 25, which you had -- you were looking at earlier.
6 All it said was the purpose, this purpose, talking about
7 what Little Isle IV, its purpose would be, shall be
8 accomplished by presenting one or more -- one or a series
9 of real estate investment opportunities in Hawaii, Hawaii?

10 A. That is correct.

11 Q. Following the proper due diligence in evaluating the
12 short and long-term opportunities associated with each.

13 So, originally, the bylaws said you could invest
14 in Hawaii and in associated projects. Then this Kenner
15 217 expanded that to give you authority to do lending of
16 other kinds like, for instance, to Mr. Jowdy?

17 A. Correct. It was altered in the Article 2 purpose
18 section on the September 1, 2004 bylaws of Little Isle IV
19 that John Kaiser and I signed off on.

20 Q. Right. But John Kaiser was never a member of Little
21 Isle IV, so why did he need to sign that agreement?

22 A. It's actually inaccurate. He was never a member.
23 There was -- the original 2003 bylaws of Little Isle IV
24 represented each of the individuals that had originally
25 invested prior to the 250 in the Little Honu-Apo closing

Kenner - cross/Miskiewicz

4662

1 in late December 2003.

2 Q. I'm going to show you, borrowing back Mr. Haley's
3 copy, but Government's Exhibit 103, do you recognize any
4 of the e-mail addresses there?

5 A. All of them.

6 Q. That's an e-mail you sent, is it not?

7 A. Yes, it is.

8 Q. You were sending it in or about November of 2010,
9 long after the date of Kenner Exhibit 217, right?

10 A. Approximately six years later.

11 Q. You were sending it to Mr. Stolper, we heard a lot
12 about it in this trial?

13 A. Yes, sir.

14 MR. MISKIEWICZ: Government offers 103.

15 MR. LaRUSSO: Your Honor, may I have a brief
16 sidebar?

17 THE COURT: Yes.

18 (Continued on the next page.)
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Kenner - cross/Miskiewicz

4663

1 (Sidebar.)

2 MR. LaRUSSO: Judge, the only qualification is
3 this appears to be Mr. Kenner transmitting information
4 from a source I don't know, or a document I don't know,
5 and it's probably double hearsay, and I don't think he can
6 testify to the truth of it, at least looking at it. So
7 I'm going to object to the introduction.

8 THE COURT: It's an admission against. Kenner
9 wrote this.

10 MR. LARUSSO: I don't know if he wrote this.
11 That's the point. Looks like a transmission. It has
12 numbers, 8, 17, 100; portions of a document.

13 MR. MISKIEWICZ: I think -- I would be
14 speculating what he would say. I believe he just
15 testified he sent this. I believe that my speculation is
16 it has reference to him getting back to Mr. Stolper about
17 individual paragraphs in some sort of a document. I will
18 ask him. I'm not particularly concerned about the
19 references to Mr. Constantine. We can redact it if
20 counsel wishes.

21 MR. LaRUSSO: Then I will remove my objection
22 under that.

23 THE COURT: You want number 8?

24 MR. MISKIEWICZ: Number 8.

25 THE COURT: He will redact it so it has only

Kenner - cross/Miskiewicz

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1 number 8.

2 MR. LaRUSSO: Also number 17, too.

3 THE COURT: He is taking out --

4 MR. MISKIEWICZ: I'm only interested in
5 references to Little Isle IV.

6 THE COURT: He is only keeping in the references
7 to 8.

8 MR. LaRUSSO: That's fine.

9 MR. HALEY: May I have a moment? He took my
10 copy. I want to see it.

11 THE COURT: Read number 8. You can redact it
12 later.

13 MR. HALEY: Okay.

14 (Sidebar concluded.)

15 (Continued on the next page.)

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Kenner - cross/Miskiewicz

4665

1 (In open court.)

2 MR. MISKIEWICZ: Again, we move for the
3 admission of 103, subject to sidebar.

4 THE COURT: 103 is admitted in redacted form.
5 Only one part that is relevant. It's going to be redacted
6 later.

7 (Government Exhibit 103 received in evidence.)

8 THE COURT: Mr. Miskiewicz will read the portion
9 that's in evidence.

10 MR. HALEY: No objection.

11 MR. LaRUSSO: Under those terms, no objection.

12 Q. Let me cover a couple of preliminary questions here.

13 Mr. Kenner, I will not ask you to read anything
14 yet, but the subject heading in the document is
15 "countercomplaint," correct?

16 A. Yes.

17 Q. You are writing it -- you wrote this, correct?

18 A. It appears to be.

19 Q. You wrote this e-mail to Michael Stolper and cc'd it
20 to a bunch of people, correct?

21 A. That is correct.

22 Q. You cc'd it to, among other people, John Kaiser, CR
23 Gentry, Bryan Berard, Timothy Gaarn?

24 A. And Eric Hatzimemos.

25 Q. Then were you responding to an earlier e-mail from

Kenner - cross/Miskiewicz

4666

1 Mr. Stolper?

2 A. I was responding to something.

3 Q. You were responding to what, a document that had been
4 drafted?

5 A. I don't recall.

6 Q. You say in 2010, November 27, 2010, I will read
7 exactly what it says here, 8.

8 MR. HALEY: You have my copy.

9 THE COURT: Stand next to Mr. Haley.

10 MR. HALEY: Thank you, Judge.

11 Q. 8, I am not sure that Kaiser ever signed an agreement
12 with Constantine on behalf of Little Isle IV LLC. Kenner
13 was the managing member of Little Isle IV LLC, not Kaiser.
14 Kaiser has never been a member of Little Isle IV, LLC.

15 You wrote that, didn't you?

16 A. Yes, sir, I wrote that.

17 Q. So in the bylaw signed, you say was signed September
18 1, 2004, which has your signature on behalf of the
19 managing -- being a managing member of Little Isle IV,
20 LLC, there is a second signature of yours as a member of
21 GuideDog, LLC. Then there is a signature here for John R.
22 Kaiser. This whole agreement is about Little Isle IV, not
23 John Kaiser's company. There is no reason to have Mr.
24 Kaiser sign this document expanding the purposes of your
25 corporation, was there?

Kenner - cross/Miskiewicz

4667

1 A. Yes, there was.

2 Could I see the Little Isle IV bylaws so I can
3 refresh my recollection to the rest of the elements of the
4 document, please?

5 Q. We will be able to do that on redirect.

6 My question to you is: Mr. Kaiser was not a
7 member of your company, we just read --

8 A. I believe it does reflect that in that document.
9 That's why I asked you to refresh my recollection, please.

10 Q. You wrote in 2010 he was never a member of Little
11 Isle IV.

12 In 2004, my question to you is, he has no
13 authority to sign on behalf of this amendment to the
14 bylaws expanding Little Isle IV's handling of player
15 money, right?

16 A. I believe he is an equity shareholder in that company
17 by derivative.

18 Q. I think we will move on.

19 A. I can show you, if you give me the document.

20 Q. Mr. Haley will have plenty of time.

21 Sir, I show you what you also introduced into
22 evidence as Kenner 1. This is the limited liability
23 company agreement of Little Isle IV dated April 26, 2006,
24 right?

25 A. That is correct.

Kenner - cross/Miskiewicz

4668

1 Q. That would place it -- well, more than two years
2 after this amendment to the bylaws that supposedly gave
3 Little Isle IV authority to lend money to Mexico, right?

4 A. That's correct.

5 Q. And this document was found in your home, right?

6 A. It was turned over by the U.S. Government to my
7 attorney in pretrial.

8 Q. And when it was turned over, you spent, you said, 100
9 percent of your time over the last several months
10 preparing for and reviewing 2 million pages of documents.
11 You know what PKHOME references in the documents you were
12 provided because the government provided them in a certain
13 order to you, correct?

14 A. I testified that I spent 100 percent of my time for
15 the last 19 months, not the last several months, preparing
16 for this.

17 Q. You know what PKHOME means? This was among the
18 documents retrieved from your house, right?

19 A. I believe so.

20 Q. This document is dated two and a half years after the
21 bylaws signed by you and John Kaiser expanding the reach
22 of Little Isle IV, right?

23 A. That's in correct.

24 Q. Are you saying April 26, 2006 does not come after
25 September 1, 2004?

Kenner - cross/Miskiewicz

4669

1 A. That's not what I'm saying. I would agree with that
2 statement.

3 Q. It says here under the purpose, first page: The
4 purpose of the company -- says: The company has been
5 organized to acquire and develop two parcels of real
6 estate in Hawaii, the legal descriptions of which are set
7 forth in Schedule A of this agreement, parentheses, it
8 says together, the property. Doesn't say anything about
9 lending money outside of Hawaii, does it?

10 A. No, sir. This was a new agreement that was drafted
11 in concert with my attorney Larry Markowitz and William
12 Najam and attorneys from Lehman Brothers to address all
13 the open issues prior to the Lehman Brothers agreement to
14 fund joint venture project.

15 Q. But at this point, your testimony is the company
16 already has made loans, \$5 million worth of loans to Ken
17 Jowdy. You don't mention it in this agreement, do you?

18 A. No, sir. One of the sticking points with Lehman
19 Brothers, they no longer wanted us to have the ability to
20 lend money, so that, as part and parcel to creating new
21 operating agreements, that would be in effect upon
22 completion of the joint venture agreement.

23 Q. Is there a memo to that effect from Lehman Brothers?
24 Is there an e-mail, text, anything other than your say-so?

25 A. There didn't need to be. There was a new operating

Kenner - cross/Miskiewicz

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1 agreement.

2 Q. Sir, I'm asking you a yes or no question. Is there
3 an e-mail attached or anything?

4 MR. HALEY: Objection.

5 Q. Not whether it was needed. Is there anything
6 documenting that Lehman Brothers said what you have just
7 alleged?

8 MR. HALEY: May my client simply be permitted to
9 answer the question?

10 THE COURT: That's a yes or no question. He was
11 explaining why there wasn't such a document. The question
12 doesn't ask why. He is asking whether or not. Mr. Haley
13 can ask you why on redirect. The question is whether or
14 not there was, Mr. Kenner.

15 A. There may have been.

16 Q. Well, in the last 19 months of reviewing 2 million
17 pages' worth of discovery, did you find one?

18 A. I haven't seen all the e-mail communication between
19 myself and my attorneys during that period of time.

20 Q. You could have subpoenaed your attorney's e-mails and
21 documents at any point prior to your testimony near this
22 trial, couldn't you?

23 MR. HALEY: Objection.

24 THE COURT: Sustained.

25 Q. Well, holding aside your lawyers, if there was a

Kenner - cross/Miskiewicz

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1 document that you recalled signing, or a memo that you
2 sent to one of your player clients, even if you didn't
3 possess it and the government didn't give it to you in
4 discovery, you knew you could have subpoenaed those people
5 for those records prior to your testimony here today,
6 right?

7 MR. HALEY: Objection.

8 THE COURT: Sustained.

9 Q. In this 2006 agreement, you don't say there are
10 outstanding loans. In fact, all you say is the company
11 shall not own any assets other than the property, meaning
12 the Hawaii proper, right?

13 A. This was an operating agreement created between my
14 attorneys, Larry Markowitz and William Najam and the
15 attorneys from Lehman Brothers, to satisfy the
16 requirements prior to the joint venture closing.

17 Q. Are you saying that your lawyers were just concealing
18 the fact that Little Isle IV had an outstanding asset of
19 \$5 million, meaning the money loaned to Ken Jowdy, is that
20 what you are saying?

21 A. I don't believe any operating agreement would
22 disclose something like that. I have never seen it in all
23 the operating agreements put in front of me.

24 Q. It says: The company shall not engage in any
25 business, directly or indirectly, other than the

Kenner - cross/Miskiewicz

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1 ownership, management and operation of the property,
2 meaning the Hawaii properties.

3 Again, there is no, except for what we did back
4 in 2004 with Ken Jowdy, there is nothing like that in this
5 agreement, right?

6 A. I think that would always be assumed, any prior
7 activity would be rolled up into a current agreement.

8 Q. This document, been a lot of testimony on
9 cross-examination with witnesses with, this is a document
10 that has signatures for various employer clients, right,
11 acknowledging they read the agreement?

12 A. Yes, sir.

13 Q. In sum and substance, there is nothing in this
14 agreement in 2006 making reference to the fact that Little
15 Isle IV has and has made loans outside of the Hawaii
16 properties, right?

17 MR. HALEY: I believe -- objection.

18 THE COURT: Overruled. You may answer.

19 A. Can you ask the question again, please?

20 Q. There is nothing in this agreement that your employer
21 clients could have read that would have informed them in
22 this agreement that Little Isle IV has previously made
23 loans to Ken Jowdy?

24 A. That wouldn't be normal language in an operating
25 agreement.

Kenner - cross/Miskiewicz

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1 Q. I'm merely asking you a yes or no question. Is there
2 anything in this agreement, yes or no, that informs them
3 you made \$5 million or more in loans to Ken Jowdy from the
4 Hawaii venture?

5 A. That is not specifically referenced in the Little
6 Isle IV operating agreement.

7 Q. Is it referenced at all specifically or otherwise?

8 A. Where?

9 Q. Kenner 1. Kenner 1, specifically or otherwise? You
10 want to read the whole document?

11 A. What document is Kenner 1?

12 Q. Document we have been looking at right now.

13 A. Sorry, it wasn't disclosed to me. I don't believe
14 so, not in the limited liability operating agreement of
15 Little Isle IV would that be mentioned.

16 MR. MISKIEWICZ: Your Honor, I'm about to start
17 a new section.

18 THE COURT: Let's take the morning break. Don't
19 discuss the case.

20 (The jury leaves the courtroom.)

21 THE COURT: We will take a 15-minute break.

22 (Whereupon, at this time a recess was taken.)

23 THE COURT: Please be seated.

24 Let's bring in the jury.

25 (The jury enters the courtroom.)

Kenner - cross/Miskiewicz

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1 THE COURT: Please be seated.

2 BY MR. MISKIEWICZ: (Cont'd)

3 Q. Mr. Kenner, there has been testimony about a funding
4 consulting agreement, Government's Exhibit 5104. Do you
5 remember seeing this?

6 A. Yes, sir.

7 Q. Do you remember, in sum and substance, this was an
8 agreement between Little Isle IV and Constantine
9 Management Group, correct?

10 A. That is correct.

11 Q. There are two of them, one dated 12/15/04 and the
12 other one dated 6/1/05. You testified in direct that the
13 one on December 15, '04 had your signature. You also
14 testified that after signing, or having Mr. Constantine
15 sign his signature line on this document, you then
16 retained it and had it signed by Mr. Kaiser at another
17 time, correct?

18 A. That is correct.

19 Q. So even though there are dates on both documents, one
20 12/15/04, the other 6/1/05, you would agree that they were
21 not -- both agreements were not signed on the dates that
22 are indicated in that document, correct?

23 A. That is correct. We were not all three parties in
24 the room at the same time.

25 Q. Okay. You testified, I'll quote from page 4305, your

Kenner - cross/Miskiewicz

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1 answer to one of the questions posed to you by Mr. Haley:

2 Question: When did that happen?

3 Answer: Well, as I mentioned earlier, there
4 were two signings that actually occurred on each one of
5 these documents. The original, and this is on 4305, the
6 original consulting agreement that Mr. Constantine had
7 drafted for Little Isle to sign, he had signed it in or
8 about December 15th of '04. He had called me to his
9 office at the time, which I picked up the document, told
10 Mr. Kaiser I was going to visit with him in the State of
11 Hawaii shortly thereafter on one of our next due diligence
12 trips. At that point in time, I took the document with me
13 to Hawaii, and Mr. Kaiser and I both signed it the next
14 time we were together.

15 Then it goes on.

16 What do you mean by due diligence trips?

17 A. Mr. Kaiser and I and Mr. Manfredi would travel to
18 Hawaii on a regular basis between my first meeting with
19 them in 2003 and closing of the Lehman Brother loan in
20 August of 2006, and we would work with local architects,
21 local archeologists, geohazard geologists, engineers, our
22 lawyers, bankers, community planning directors, Mr. Yuen,
23 working on the development of the parcels, the subdivision
24 reconsolidation efforts we were making during all of the
25 periods of time we were in control of the project through

Kenner - cross/Miskiewicz

4676

1 the Lehman closing.

2 Q. That's what you mean by due diligence trips,
3 shorthand for doing all the kinds of things that needed to
4 be done before Lehman came along; is that right?

5 A. Yes, sir.

6 Q. I think you testified about a senator you would meet
7 with periodically?

8 A. I met with Senator Avery Chumbley on at least one
9 occasion to discuss the extension request by me on the
10 Waikapuna parcel, when I walked away from the Lehman
11 Brothers loan in 2005, prior to the Urban Expansion
12 funding about seven weeks later.

13 Q. So even though it says, for instance, in the earlier
14 of the two agreements in 5104, even though there it says
15 next to John Kaiser's signature, 12-15-04, didn't happen,
16 he didn't sign it according to you on that date? He
17 signed it sometime when you were next out in Hawaii?

18 A. I believe that's correct.

19 Q. And where were you when you signed it in Hawaii?

20 A. I don't recall.

21 Q. Well, was it, you said on direct it was one of those
22 due diligence trips where --

23 A. The trip could have started in Honolulu, which is on
24 the island of Oahu. While we were meeting either with
25 bankers or some of our lawyers from Carlsmith Ball.

Kenner - cross/Miskiewicz

4677

1 Typically the trips would begin there for me. And then I
2 would travel to the big island of Hawaii, which is a
3 separate island. We may have been on a trip to Hilo with
4 Carlsmith Ball lawyers or on the property site itself. We
5 could have been at one of the rental homes that we
6 utilized until I purchased a home for a home office for
7 the project. Could have been in any one of those
8 locations.

9 Q. Was the rental home in Discovery Harbor?

10 A. I don't believe -- from time to time I believe that
11 they did -- Mr. Kaiser and Mr. Manfredi rented homes in
12 Discovery Harbor as well.

13 Q. My question is, where would you typically meet Mr.
14 Kaiser during these due diligence trips?

15 A. Could have been at any one of those locations that I
16 spoke of.

17 Q. Okay. Then you said, I think you said similarly
18 after the second agreement was signed 6/1/05, you went
19 back out and you recall testifying, in sum and substance,
20 that you had Mr. Kaiser sign it, backdate it, but sign it
21 during another one of the due diligence trips, right?

22 A. I believe I testified that he signed it, then dated
23 it pursuant to the date that was on the document just
24 above the signature line.

25 Q. That's all I meant by backdate.

Kenner - cross/Miskiewicz

4678

1 A. Okay. I agree with you.

2 Q. Move on.

3 Discovery Harbor, you testified on direct -- you
4 testified about this chart 4 in -- sorry, chart 1 in
5 evidence. You don't disagree with any of the dollar
6 figures and transactions that are depicted in this chart,
7 do you?

8 A. No, they all appear to be accurate.

9 Q. And there was another one also regarding Discovery
10 Harbor lot, this has to do with money originating from Mr.
11 Sydor. You don't disagree with the amounts of money or
12 the transactions depicted here either, do you?

13 A. They also seem to be accurate.

14 Q. Your testimony was that Mr. Kaiser and Manfredi
15 decided that they were going to use Discovery Harbor lots
16 to test something? Could you repeat what they were going
17 to be testing?

18 A. If I recall correctly, the idea behind purchasing in
19 or about 2005 those individual home sites was, we were
20 still in the extended due diligence process with the
21 District of Cau getting our subdivision and
22 reconsolidation plans approved by the county. And what
23 Mr. Kaiser wanted to do in particular was make sure that
24 any of the materials or supplies that we needed eventually
25 for the larger scale homes, the 10,000-square foot homes

Kenner - cross/Miskiewicz

4679

1 we intended to build on the properties, we would be able
2 to build those in a small, scaled-down version and get the
3 supplies we needed from the mainland.

4 Q. I'm going to focus on just a portion of it here.

5 When Discovery Harbor lots were sold in 2013 at
6 a loss, \$31,000, you didn't -- you are not disagreeing
7 with the chart, insofar as it indicates they received
8 \$31,528.65 and then after receiving it, you subsequently
9 transferred it to yourself in four separate cash
10 withdrawals, correct?

11 A. That is correct.

12 Q. And you did that -- why did you do that?

13 A. I did it for two purposes. One was that the
14 recommendation of the bank, they suggested that I should
15 withdraw funds in less than 10,000 per withdrawal. And
16 second, the reason I needed the cash is because we were
17 hiring new attorneys that needed to be paid pursuant to
18 our ongoing pursuit of Mr. Jowdy and the various issues we
19 discussed ad nauseam in this trial.

20 Q. What bank was this you made these withdrawals?

21 A. Chase Bank.

22 Q. Are you saying Chase Bank recommended to you that you
23 make a series of withdrawals of under \$10,000 in cash?

24 A. They told me that, they were the ones that told me if
25 you withdraw less than 15,000 they wouldn't have to fill

Kenner - cross/Miskiewicz

4680

1 out various forms at the bank, so I had an immediate
2 urgency for the money, so I told them I would take it out
3 in \$9,000 increments.

4 Q. So between April 9th -- you made two separate cash
5 withdrawals, the earliest here on April 9, 2013, right?

6 A. Yes.

7 Q. And I understand that we are looking at a chart, not
8 the bank records, to move things along, assuming these are
9 accurate and the bank records are in evidence, you are
10 saying that you went to a Chase Manhattan Bank, or Chase
11 Bank, and made a \$9,500 cash withdrawal. When did they
12 tell you to do this?

13 MR. HALEY: I object, Judge.

14 THE COURT: Overruled. You can answer that.

15 A. When I was attempting to withdraw the entire amount.

16 Q. So on that day, April 9, 2013, you were going to
17 withdraw the entire sum, whatever these transactions add
18 up to, and they told you, in sum and substance, don't do
19 it that way, do it this way, right?

20 A. That is correct.

21 Q. You understand that there would have to be what is
22 referred to as a currency transaction report generated for
23 withdrawal of cash above \$10,000, right?

24 A. I'm not familiar with that.

25 Q. They told you there would have to be no report filed

Kenner - cross/Miskiewicz

4681

1 if you structured your withdrawals in increments below
2 \$10,000, right?

3 A. They told me they would not have to fill out a
4 document for the bank if that were the case.

5 Q. And you understand that document eventually goes to
6 the Department of Treasury and its anti-money laundering
7 provision? That's why they do that, right?

8 A. I'm not familiar with the government's protocols.

9 Q. You are saying Chase Bank told you you can avoid
10 making the necessity of filling out this report by
11 structuring these withdrawals in this fashion, right?

12 A. Yes, sir, they did. I would have gladly taken the
13 whole \$31,000 at once.

14 Q. And what did you do? Return to the bank and make a
15 second withdrawal, or just stay there and go back to the
16 end of the line and come back to the same teller and
17 withdraw the second \$9,000 on April 9, 2013?

18 A. I didn't follow that, but I did not get back at the
19 end of the line. I recall driving around, doing other
20 errands that day, and stopping at a different bank.

21 Q. So that at the end of that first day, you had \$18,500
22 in cash withdrawn, right?

23 A. Yes, sir.

24 Q. Representing in part proceeds from the sale of
25 Discovery Harbor lots, right?

Kenner - cross/Miskiewicz

4682

1 A. That is correct.

2 Q. And then you returned two more days and made two
3 subsequent cash withdrawals on April 12th and April 17th,
4 2013?

5 A. Yes.

6 Q. You did that also at the behest or suggestion of
7 Chase Bank?

8 A. It didn't have to be suggested more than once.

9 Q. Just for clarity, chart number 2, this represents the
10 same series of transactions but at a different time.
11 Additional money came out from the proceeds of the sale,
12 June 14th, is that correct?

13 A. That appears to be correct.

14 Q. Then, again, went to you, and you withdrew in June,
15 June 14th and June 17th, you made two more cash
16 withdrawals under \$10,000, right?

17 A. That is correct.

18 Q. And by the way, that box there that says B. Kenner,
19 that's Blake Kenner, your son?

20 A. Yes.

21 Q. That's his account?

22 A. It was a custodian account I held for him.

23 Q. So you buy Discovery Harbor lots with -- how many
24 were there, by the way?

25 A. There were five lots.

Kenner - cross/Miskiewicz

4683

1 Q. You buy it in part with \$265,000 drawn down from the
2 Berard line of credit in March of '05?

3 A. Purchased with funds that were deposited into the
4 Little Isle IV bank account for company purposes.

5 Q. Well, okay. My question is where did -- where did
6 that money come from to be deposited in the Big Isle IV
7 account?

8 A. It was a portion of Mr. Berard's capital contribution
9 to Little Isle IV.

10 Q. Capital contribution, how do you define capital
11 contribution? There's been testimony about cash deposits,
12 or investments, I should say, then lines of credit. How
13 do you define capital contribution?

14 A. It would include both categories.

15 Q. So you have no -- you agree that \$265,000 came out of
16 Mr. Berard's line of credit?

17 A. Yes, it did.

18 Q. At Northern Trust?

19 A. Yes, sir.

20 Q. And again, Big Isle -- Big Isle VI, you controlled
21 that LLC?

22 A. Yes, I did.

23 Q. You were the managing member of Big Isle VI?

24 A. Yes, sir.

25 Q. And capital contributions, we have seen documentation

Kenner - cross/Miskiewicz

4684

1 showing that permission that capital contributions, or I
2 should say withdrawal from a line of credit could fund
3 Little Isle IV, correct?

4 A. Yes, sir.

5 Q. Where did you get the authority to send the money to
6 Big Isle VI, which is a completely different entity?

7 A. All of the entities in Hawaii were partners of Little
8 Isle, or subpartners of Little Isle IV.

9 Q. So basically, to you it didn't matter if the money
10 went to Little Isle IV, Big Isle VI, it was all one big
11 pot of money?

12 A. All part and parcel from capital contributions to
13 Little Isle IV or the other members who invested.

14 Q. Now, did Mr. Berard know this at the time that you
15 made this withdrawal in March 24, 2005 with his money,
16 that he was borrowing against his savings, \$265,000?

17 A. Mr. Berard had already authorized the use of his line
18 of credit as a full capital contribution to Little Isle IV
19 for his equity ownership.

20 Q. So by initially getting involved in the Hawaii
21 project, you are saying that was all the authority you
22 needed to manage his money in this manner, is that right?

23 A. With the letter of authorization that each one of the
24 line of credit holders signed individually with the bank,
25 giving me authorization to draw down on the line of credit

Kenner - cross/Miskiewicz

4685

1 for Little Isle IV.

2 (Continued on the following page.)

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Kenner - Cross/Miskiewicz

4686

1 BY MR. MISKIEWICZ (Cont'd):

2 Q. Well, okay.

3 So just to be clear, though, on or about March
4 24, 2005, when Mr. Berard's line of credit was drawn down
5 upon to the tune of \$300 -- I'm sorry -- \$265,000, you did
6 not specifically notify him on or about that day what you
7 were doing, did you?

8 A. It would not have been my protocol to let any of the
9 members know on a day-to-day expense basis or purchase
10 basis what specially was going on inside the authorization
11 of Little Isle IV.

12 Q. And going to chart No. 2, this is another portion of
13 the money that was used to by one of the Discovery Harbor
14 lots, this indicates on or about February 7, 2005,
15 \$200,000 was drawn down from Darryl Sydor's line of
16 credit.

17 Correct?

18 A. Yes, sir.

19 Q. But in this case you were sending it to the
20 Little Isle IV, not Big Isle VI.

21 Why did you do it that way?

22 A. I would make a request to the bank and tell them that
23 we were going to drawn down on a portion of someone's line
24 of credit. And I would ask them to deposit it into the
25 bank accounts.

Kenner - Cross/Miskiewicz

4687

1 I did notice over the last 19 months when
2 reviewing some of the Northern Trust Bank records that not
3 all of the deposits came from lines of credit went
4 directly into Little Isle IV as the bank had required, and
5 the individuals had signed for.

6 Occasionally the bank had bypassed the
7 Little Isle IV deposit, put it directly into the deposit
8 account.

9 Q. So are you saying that when Mr. Berard's money went
10 directly to Big Isle VI, that was the bank's fault?

11 A. That would have been a bank transaction.

12 I had instructed them that we would need the
13 money into the Little -- into Big Isle VI's bank account,
14 and I guess upon review the bank just skipped the
15 Little Isle IV step.

16 Q. But as with Mr. Berard, just going back to the
17 initial transfer of money, that \$200,000, you did not on
18 or about February 7, 2005, tell Mr. Sydor about that
19 transaction, did you?

20 A. It would not have been my typical protocol to alert
21 any of the individual members of the company about
22 specific expenses or transactions.

23 Q. And I'm going to show you, again, a copy of the July
24 21, 2006, letter or agreement that Little Isle IV sent to
25 the members of Little Isle IV.

Kenner - Cross/Miskiewicz

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1 This one is -- the one I'm showing you right now
2 is Kenner Exhibit 16. It's the same as Kenner Exhibit 1
3 and some of the other copies we have seen, correct?

4 A. It appears to be.

5 Q. And in this document where you are defining all the
6 parcels then owned by Little Isle IV, you don't ever make
7 mention of Discovery Harbor, do you?

8 A. This document didn't define all of the parcels that
9 were owned by Little Isle IV.

10 Q. So you are saying there is another document that
11 defined Little Isle IV's ownership interest in
12 Discovery Harbor lots?

13 A. Little Isle IV was a member of Big Isle VI.

14 That is correct.

15 Q. My question to you is, you have Little Honu'Apo, 258
16 acres, that was the original 258 acres that Mr. Manfredi
17 and Mr. Kaiser put a down payment on back in was it 2002?

18 A. Yes.

19 They put a \$10,000 deposit down.

20 Q. And that holding company was Big Isle IV Ventures,
21 right?

22 Honu'Apo, that's 1,500 acres, Big Isle V,
23 Waikapuna, another 2,015 acres under Ka'u Holding, and --
24 how do you pronounce that?

25 A. Moaula.

Kenner - Cross/Miskiewicz

4689

1 Q. Moaula, 1,800 acres under Moaula Farm and Ranch
2 Company, something called Church here under Big Isle IV
3 ventures.

4 It says:

5 As you may know, the company has interests in
6 five Delaware and Hawaii entities, in parentheses, the
7 holding companies, that own, or in the case of Moaula
8 parcel have right to acquire the following parcels of real
9 estate in Hawaii.

10 You never mentioned Discovery Harbor lots in any
11 of this, do you?

12 A. No, sir, because it was not part of the joint venture
13 roll up with Windwalker and Lehman Brothers.

14 Q. So you didn't tell Berard and Sydor at the time their
15 money was being drawn down from lines of credit to buy
16 Discovery Harbor, and you didn't tell them over a year
17 later in '06, or there's nothing here that would tell
18 them, hey, by the way, some of your money went to a
19 different parcel of land, not included.

20 Right?

21 A. The home sites, as they were referred to, were
22 recognized in the joint venture term sheet originally
23 signed with Lehman Brothers and Windwalker and
24 disseminated to the group and the 7 inches of documents
25 that we saw Mr. Sydor send to the court also represents

Kenner - Cross/Miskiewicz

4690

1 the exclusion of the home sites as part of this joint
2 venture roll up --

3 Q. Mr. Kenner --

4 A. -- it is documented --

5 Q. There is nothing in this document, just like there's
6 nothing in this document that says anything about Ken
7 Jowdy borrowing money, there is nothing in this document
8 that says anything about Discovery Harbor lots, is there?

9 A. There is not.

10 There are a lot of elements that were not
11 recognized in that joint venture roll up disclosure
12 letter.

13 Q. You testified on direct I believe yesterday about an
14 environmental indemnity agreement, Kenner Exhibit 30.

15 This was also found in your home, correct?

16 A. Yes, sir.

17 Q. That indemnity agreement, you also introduced
18 something called Kenner 218 which is also entitled
19 environmental and hazardous substance indemnification
20 agreement.

21 A. Yes, sir.

22 I recall that.

23 Q. And there is no mention of Discovery Harbor lots in
24 either of these either, correct?

25 A. It wouldn't make any sense for them to be in there.

Kenner - Cross/Miskiewicz

4691

1 Q. My question to you, just yes or no, Discovery Harbor
2 lots is not referenced anywhere in that environmental
3 indemnity agreement, sit?

4 A. No, sir, it's not.

5 Q. Yesterday you said -- different topic here -- at some
6 point there were something like 12 lawsuits against
7 Mr. Jowdy.

8 In fact, sir, many of the lawsuits you were
9 referring to were not against Mr. Jowdy. They were
10 lawsuits, for instance, the Myrick lawsuit that you were
11 involved in.

12 Correct?

13 A. I never testified that there were 12 lawsuits against
14 Mr. Jowdy.

15 Q. You didn't -- okay.

16 You testified earlier today that the lawsuit in
17 Las Vegas, Nevada, was ultimately dismissed, right?

18 A. No, sir.

19 Q. The district court case in Nevada was not dismissed?

20 A. No, sir.

21 Mr. Jowdy lost a \$1 million judgment to Glenn
22 Murray and I won in Mr. Jowdy's counterclaim against me
23 for indemnification.

24 I represented myself in that case.

25 Q. The lawsuit that you initiated in behalf of Ula

Kenner - Cross/Miskiewicz

4692

1 Makika and one of the other companies, that was dismissed,
2 wasn't it?

3 A. The Little Isle IV Ula Makika Phil Kenner lawsuit v
4 Ken Jowdy was dismissed.

5 Q. Then there was another lawsuit filed in California,
6 this was after the Global Settlement Fund was initiated.

7 Right?

8 A. There were three lawsuits filed in California.

9 Q. Well, there's been testimony among others by your
10 former attorney Ron Richards that one of those lawsuits
11 was dismissed without prejudice.

12 You don't disagree with that, right?

13 A. I do not disagree with that.

14 Q. There's been testimony about a lawsuit against
15 Ms. Myrick.

16 You settled that lawsuit, did you not?

17 A. They settled with me out of court.

18 Q. There was a settlement agreement?

19 A. Yes, sir.

20 Q. Neither party admitted wrongdoing or conceded to
21 whatever the other party was doing.

22 Correct?

23 A. I'm not sure what the specific details were, but they
24 paid me out of court settlement.

25 Q. One of the allegations you made in the Myrick lawsuit

Kenner - Cross/Miskiewicz

4693

1 was that Ms. Myrick had taken and absconded with the hard
2 drives onto which all of your records for Standard
3 Advisors were located at the time.

4 Right?

5 A. That is correct, her and her attorney confirmed that
6 during testimony -- during her deposition, excuse me.

7 Q. And then you settled?

8 A. They settled with me.

9 They paid me an out-of-court settlement prior to
10 trial.

11 Q. But you had a lawyer, right?

12 A. Yes, sir, I did.

13 Q. You could have done anything -- you could have
14 inserted all kinds of provisions as part of that
15 settlement if you wished.

16 Correct?

17 A. That is not true.

18 They would have been subject to their agreement.

19 Q. But you didn't even ask, did you, sir, for your hard
20 drives back, did you?

21 A. That is incorrect.

22 Q. You didn't get them back.

23 A. No, sir, I did not.

24 Q. Because you didn't want them back.

25 A. That is absolutely incorrect.

Kenner - Cross/Miskiewicz

4694

1 Q. Because you knew that there was nothing in those hard
2 drives that Ms. Myrick absconded with that would have
3 supported any contention that you have here that everybody
4 knew what you were doing with respect to money, isn't that
5 true?

6 A. That also is absolutely incorrect.

7 I would love to have those hard drives back
8 today, if I could.

9 Q. Why didn't you subpoena them for this trial?

10 MR. HALEY: I would object.

11 THE COURT: Sustained.

12 MR. MISKIEWICZ: May I have a moment, your
13 Honor.

14 (There was a pause in the proceedings.)

15 BY MR. MISKIEWICZ:

16 Q. There's been testimony, I think you were asked on
17 direct about testimony from Mr. Ranford.

18 Do you recall Mr. Ranford testified that he had
19 met you a few weeks before your arrest.

20 Correct?

21 A. Yes, I recall that testimony.

22 Q. And you recall Mr. Ranford testified that he had
23 asked you in that meeting for documentation that he could
24 use to help him understand where his various investments
25 were.

Kenner - Cross/Miskiewicz

4695

1 Right?

2 A. That was not discussed in that meeting.

3 Q. My question to you is, you recall testifying -- or do
4 you recall Mr. Ranford had said that?

5 A. I apologize.

6 Yes, I do recall Mr. Ranford testifying to that.

7 Q. And you were asked by Mr. Haley whether there was
8 anything untruthful about what Mr. Ranford said to you.

9 Correct?

10 A. That is correct.

11 Q. In fact, at page 4187 you were asked if you recall
12 the testimony and you were asked was that truthful
13 testimony from your perspective, sir?

14 Answer: It was not. My computer was present
15 and working during our meeting that day.

16 Do you remember answering that -- or giving that
17 testimony a couple of days ago on direct?

18 A. Yes, I do.

19 Q. You said that because Mr. Ranford said that he was
20 told by you that your laptop was not working, or your
21 computer was not working.

22 Correct?

23 A. No.

24 I said it because it was the truth.

25 Q. My question to you, sir, is you said Mr. Ranford's

Kenner - Cross/Miskiewicz

4696

1 testimony was untruthful because in the sense that he
2 testified that your laptop was not working and you dispute
3 that.

4 You said that never came up and, in fact, your
5 computer was functioning, correct?

6 A. My computer was present during our meeting.

7 Q. And functional?

8 A. Yes, sir.

9 We looked at web sites while we were on my
10 computer that day.

11 Q. And so we are clear, the laptop that you provided --
12 I'm sorry -- the laptop that we are talking about at this
13 meeting with Mr. Ranford is what I'm showing you now,
14 device No. 1?

15 A. Yes.

16 Q. And this was functional when you met with Mr. Ranford
17 several weeks before your arrest?

18 A. That is correct.

19 Q. And, in fact, I believe you testified that there was
20 a question about whether or not you could remember this
21 being your particular MacBook.

22 You remember what you said about how you
23 identified the MacBook?

24 A. I believe that I recognized that there was a dent in
25 the --

Kenner - Cross/Miskiewicz

4697

1 Q. Is that the dent you are talking about?

2 A. That's the one I recognize, yes, sir.

3 Q. From when TSA representatives dropped it?

4 A. Yes, sir.

5 That happened on more than one occasion,
6 unfortunately.

7 Q. Remember you testified about that once before, right?

8 A. That is correct.

9 That was a different laptop I was referring to
10 at that time.

11 Q. The Myrick lawsuit, during your deposition on April
12 21, 2009, you were asked a series of questions about how
13 you kept straight and whether or not you kept a ledger,
14 specifically distinguishing Mr. Juneau and Mr. Nolan's
15 contributions to Little Isle IV.

16 Remember that series of questions?

17 A. I do not.

18 Q. Do you have any real reason to doubt that you were
19 asked questions about whether you had ledgers or
20 documentation regarding Little Isle IV back during the
21 Myrick lawsuit?

22 A. I have no reason to doubt that.

23 Q. In fact, do you remember what you said when you were
24 asked if you had a copy of any ledger?

25 A. I don't even recall the questions.

Kenner - Cross/Miskiewicz

4698

1 Q. I'll show you -- I'll refer to this as Myrick 2.

2 Showing you a portion of Myrick 2 with some
3 highlighted text. Take a minute to see if that will
4 refresh your recollection about what you said.

5 MR. HALEY: Your Honor, may I just approach?

6 THE COURT: Yes.

7 MR. HALEY: Thank you.

8 (There was a pause in the proceedings.)

9 MR. HALEY: Thank you, Judge.

10 BY MR. MISKIEWICZ:

11 Q. So, Mr. Kenner, having looked at Myrick 2, does that
12 refresh your recollection that in deposition -- in that
13 deposition in 2009 when asked if you had a ledger you said
14 it was destroyed because the TSA dropped some other
15 laptop, right?

16 A. Yes, I just read that.

17 Q. Mr. Kenner, I'm going to turn your attention now to
18 some testimony you gave about Led Better and how that came
19 about.

20 In sum you testified, did you not, sir, on
21 direct that part of the Led Better deal wrapped up in
22 giving Mr. Kaiser a short-term loan of \$400,000?

23 A. It turned out to be \$395,000, but, yes, originally he
24 had requested \$400,000.

25 Q. And you said I believe on direct that that happened

Kenner - Cross/Miskiewicz

4699

1 in part because Mr. Manfredi was threatening not to sign
2 the closing documents for Hawaii.

3 Correct?

4 A. That is correct, in the summer of 2006.

5 Q. And to buy out Mr. Manfredi in a piece of property
6 having nothing to do with Hawaii, Mr. Kaiser asked you for
7 a short-term loan of what turned out to be \$395,000.

8 Right?

9 A. Effectively he demanded it in return for one of the
10 conditions of his signature.

11 Q. I'm sorry.

12 Repeat that again. I didn't hear what you said.

13 A. He effectively demanded that a loan be made available
14 to him as one of the conditions pursuant to signing off on
15 the Lehman Brothers deal.

16 Q. Who was that, Mr. Kaiser or Mr. Manfredi effectively
17 demanded?

18 A. Mr. Kaiser did.

19 Q. So you are saying that he basically extorted you?

20 A. I did not say that.

21 I said he effectively demanded.

22 Q. Well, so what?

23 If he didn't sign, you had Lehman Brothers. You
24 were the financial person. That was your job.

25 They were managing the vertical construction and

Kenner - Cross/Miskiewicz

4700

1 due diligence. So what? You could have let him go.

2 A. No, sir, that's incorrect.

3 Lehman Brothers commanded that each and every
4 member of the Hawaiian partners signed off on the deal or
5 they were not going to go through with the financing of
6 the deal.

7 Q. So because they wouldn't sign -- when was the
8 signing?

9 A. Those were the acknowledgment and consent letters
10 that you saw each of the individual Little Isle IV members
11 sign.

12 And subsequently I think in evidence we have
13 seen Mr. Kaiser's response form for his acknowledgment and
14 consent of the deal.

15 Q. What month, what year?

16 A. Summer of 2005.

17 Q. When was Sag Harbor?

18 A. That was two months after the closing of the
19 financing from Lehman Brothers.

20 Q. So he already signed on the dotted line for the
21 Lehman closing before any of this stuff happened with the
22 Sag Harbor property.

23 Isn't that correct?

24 A. Yes, sir.

25 He signed after we had agreed to give him a

Kenner - Cross/Miskiewicz

4701

1 short-term loan.

2 Q. Not much leverage at that point, right?

3 I mean, Lehman is on board, Kaiser, Manfredi,
4 everybody signs the closing documents, and then he forces
5 you or demands from you this short-term loan?

6 A. Are you suggesting that after we agreed to it prior
7 to the signature I should have lied to him and not given
8 him the loan?

9 Q. Well, you are a businessman, sir, aren't you?

10 A. Not one to lie to people, if that's what you are
11 insinuating.

12 Q. Was this in the best interest of your clients?

13 A. Closing the Lehman Brothers financing, it was 100
14 percent in the best interest of my clients.

15 Q. Fair enough, that was a bad question.

16 Was paying an extortion demand in the best
17 interest of your clients?

18 A. The only extortion I'm aware of is a lawsuit I filed
19 against Ken Jowdy and Tom Harvey in California for
20 extortion.

21 Q. Sir, I'm not asking -- this is a very clear, I think
22 a very clear question. If you don't understand I'll
23 rephrase it.

24 My question to you is, was paying \$395,000
25 effectively extortion money to John Kaiser in the best

Kenner - Cross/Miskiewicz

4702

1 interest of your hockey player clients?

2 A. Mr. Kaiser's \$395,000 --

3 Q. Sir --

4 A. Was --

5 Q. I'm asking you a yes or no question --

6 MR. HALEY: Judge --

7 BY MR. MISKIEWICZ:

8 Q. Is paying \$395,000 to Mr. Kaiser at that stage in the
9 best interests of your clients?

10 A. I did not pay Mr. Kaiser \$395,000.

11 Q. You made him a loan, a short-term loan of \$395,000?

12 A. Yes, sir, I did, and he repaid us 11 days later.

13 Q. Out of --

14 MR. MISKIEWICZ: Withdrawn.

15 A. Out of his personal bank account --

16 Q. Why didn't he -- why did he need a loan for such a
17 short period of time?

18 A. According to Mr. Kaiser, he didn't have the funds
19 available.

20 Q. You were involved, there's been some testimony about
21 a property in Scottsdale, Arizona, sometimes referred to
22 as Paradise Valley.

23 Correct?

24 A. Yes, sir, that's correct.

25 Q. And that was a joint venture you had with Mr. Kaiser,

Kenner - Cross/Miskiewicz

4703

1 correct, among others?

2 A. With Mr. Kaiser.

3 Q. Anybody else?

4 A. No, sir.

5 Q. You had previously also been involved in a joint
6 venture with him in a property called -- in Hermosa Beach,
7 California, correct?

8 A. Her-mo-sa Beach, correct.

9 Q. And that was -- how much money did you get out of the
10 Hermosa Beach resale when that occurred?

11 A. How much did I personally?

12 Q. Well --

13 MR. MISKIEWICZ: Withdrawn.

14 BY MR. MISKIEWICZ:

15 Q. What were the proceeds of Hermosa Beach?

16 A. The net profit I believe was somewhere in the
17 neighborhood of \$1.3 million before taxes.

18 Q. And that money came to you to an account you
19 controlled at Wells Fargo.

20 Isn't that true?

21 A. All of the money from the escrow came from my account
22 because the title to the house was in my name.

23 Q. Even though Mr. Kaiser and his relatives had put up
24 the lion's share of the cash to purchase that
25 Hermosa Beach property.

Kenner - Cross/Miskiewicz

4704

1 Right?

2 A. Can you define lion's share?

3 Q. Well, wasn't it true, sir, that your portion of the
4 deal was to secure a mortgage while renovations took
5 place, and Mr. Kaiser's role was to come up with a down
6 payment, approximately 20 percent, roughly a million
7 dollars.

8 Right?

9 A. That's incorrect.

10 Q. You put in the million dollars?

11 A. I put in \$440,000, and I secured a \$4 million loan
12 against the property.

13 Q. Okay.

14 So at the end, that property was sold at a
15 profit, right?

16 A. Yes, sir, it was.

17 Q. What was the profit?

18 A. Approximately \$1.3 million.

19 Q. And was it supposed to be split?

20 A. It was split about \$653,000 apiece between me and
21 Mr. Kaiser.

22 Q. Has Mr. Kaiser seen any of that money?

23 A. Mr. Kaiser saw every penny from the California
24 project, much the same he received every penny back from
25 the Hawaii projects all documented on bank records that I

Kenner - Cross/Miskiewicz

4705

1 have seen in evidence.

2 Q. And you testified to that in your direct, that he got
3 everything out of the Hermosa Beach project.

4 Right?

5 A. Yes, sir, all of his original capital contributions
6 and his proportionate share of the profits.

7 That is correct.

8 Q. So thereafter, shortly thereafter when Paradise
9 Valley property was being renovated, you testified, did
10 you not, at page 4505 that Mr. Kaiser was in need of
11 money, that he needed to contribute to the Paradise Valley
12 property, and since he had been paid back in full by me
13 with respect to the California beach project -- that's
14 Hermosa, right?

15 A. Yes, sir, it is.

16 Q. -- at that time, and any other outstanding
17 transactions we had, in order to keep track of additional
18 money that Mr. Kaiser was borrowing, you said, you
19 continue and you say, I asked that Mr. Gaarn transfer the
20 money to Mr. Kaiser as a loan and then Mr. Kaiser
21 forwarded that money to me so I could take care of
22 expenses. I continued to front and pay for on Paradise
23 Valley Arizona renovation project.

24 That was your testimony, right?

25 A. That sounds accurate, yes, sir.

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4706

1 Q. So here we are in '06, right after Lehman, that's
2 about the same time Paradise Valley and Sag Harbor
3 transactions were occurring.

4 Right?

5 A. No, sir.

6 Q. Well, when was Sag Harbor purchased by the Led Better
7 Development Company, LLC?

8 A. On or about October 26, 2006.

9 Q. A couple of months after Lehman, right?

10 A. Approximately two months afterwards.

11 Q. And Paradise Valley is still in the works?

12 A. No.

13 We didn't take a look at Paradise Valley until
14 almost a year and a half later.

15 Q. In or about 2006, are you saying that you were
16 loaning money to Mr. Kaiser in part for the Sag Harbor --
17 the short-term loan?

18 A. Yes, that's what happened.

19 Q. Was there any other loans outstanding between you and
20 he?

21 A. At that point in time?

22 Q. Yes.

23 A. Yes.

24 There was a \$360,000 loan that was pursuant to
25 the equity transfer agreement that's been put into

Kenner - Cross/Miskiewicz

4707

1 evidence at the closing signed prior to the closing and
2 then funds transferred from the Naalehu Ventures account
3 post closing with Lehman Brothers.

4 Q. So it's more money that he owed you?

5 A. No, sir.

6 It was pursuant to our agreement for him to be
7 able to take out his entire balance of his Hawaii project
8 investment, which totaled \$1.176 million after the
9 closing.

10 Q. So has he repaid you in full since all this occurred?

11 A. At this point in time Mr. Kaiser owes me money.

12 Q. To this day?

13 A. Yes, sir.

14 I have been --

15 Q. How much?

16 A. I have been unable to pursue him in the litigation I
17 filed in 2012 against him and subsequently Mr. Berard or
18 the litigation I filed against he and Mr. Berard in 2013.

19 Q. That wasn't my question.

20 The question was how much does he owe you?

21 A. I don't know as I sit here today.

22 Q. Is it a dollar? \$10,000?

23 What are we talking about, serious money?

24 A. Serious money.

25 Q. Millions?

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4708

1 A. I would have to check my bank records.

2 Q. Now, you heard testimony from Mr. Nolan and there was
3 other evidence I believe you testified about the Nolan
4 arbitration.

5 Correct?

6 A. Yes, sir.

7 Q. And you know that you lost the Nolan arbitration,
8 correct?

9 A. Can you define lost.

10 Q. Well, there was a judgment entered against you for a
11 certain amount of money, right?

12 A. There was a judgment entered against me, that is
13 correct.

14 Q. And subsequent to that there have been a number of
15 depositions, sometimes called debtor's exams, to try to
16 find that money to pay Mr. Nolan.

17 Right?

18 A. There have been several depositions, that's correct.

19 Q. And I believe it was Mr. Kaiser, maybe I am
20 misstating who said this, somebody said that you told them
21 Mr. Nolan will never see a dime out of that money.

22 Is that true?

23 A. Which portion of that question are you asking me to
24 answer?

25 Q. Did you ever say that?

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1 A. I have never said that.

2 Q. And do you recall in your debtor's exam August 11,
3 2010 you were asked a question about the loans that were
4 outstanding I guess up through 2010.

5 Do you remember testifying about any loans that
6 were outstanding between you and Mr. Kaiser back in 2010
7 in the debtor's exam arising out of the Olan arbitration?

8 A. Out of the?

9 Q. The Nolan, the Owen Nolan arbitration.

10 A. I don't recall specifically.

11 Q. Let me show you what I'm going to mark as Nolan 1 for
12 identification, and I'm going to ask you to focus on page
13 65 and 66.

14 If you would read that.

15 MR. HALEY: May I, Judge?

16 THE COURT: Yes.

17 MR. HALEY: Thank you.

18 (There was a pause in the proceedings.)

19 MR. HALEY: Just 65 and 66?

20 MR. MISKIEWICZ: Yes.

21 MR. HALEY: Your Honor, just for purposes of
22 clarity, for the record, I think Mr. Miskiewicz wants him
23 to read 64 and 65 or 65 and 66.

24 It may be my confusion.

25 MR. MISKIEWICZ: This page and this page.

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1 MR. HALEY: Okay.

2 65 and 66.

3 BY MR. MISKIEWICZ:

4 Q. Mr. Kenner, have you had enough time to read 65 and
5 66?

6 A. Give me one moment, please.

7 (There was a pause in the proceedings.)

8 A. Yes, I have read it.

9 Q. You testified in 2010 that you owed Mr. Kaiser money,
10 not that he owed you money.

11 Isn't that true?

12 A. That's what it says, but the bank records would show
13 different.

14 Q. But that's you, that's your deposition in the
15 debtor's exam.

16 Is that not true, sir?

17 A. It's -- this is what I said in 2010, that's correct.

18 But Mr. Kaiser owes me money and the bank
19 records would reflect that.

20 Q. And, in fact, you didn't even just say generically
21 that he owed you money.

22 You said you owed him money and you couldn't
23 repay him, so you gave him Baja Ventures 2006, LLC in
24 repayment for the loan he had made you.

25 Isn't that what you said in that deposition?

Kenner - Cross/Miskiewicz

4711

1 A. Yes.

2 I recall this part of the deposition and --

3 Q. Sir, I'm --

4 A. -- we were discussing -- this is not accurate --

5 Q. I'm going to ask that you just, please, Mr. Haley's
6 going to have an opportunity.

7 My question is you said in this deposition that
8 because you could not pay Mr. Kaiser back a loan he had
9 made to you, you transferred Baja Ventures 2006, LLC, in
10 repayment of that loan.

11 Yes or no?

12 A. That's what it says on this document.

13 Q. And, sir, that's the same corporation that you
14 testified earlier in this trial on direct and also on
15 cross-examination, that owns 39 percent of Mr. Jowdy's and
16 other's Cabo San Lucas.

17 Right?

18 A. I never had a loan agreement with Mr. Kaiser with
19 reference to Baja Ventures 2006.

20 Q. Sir, again, I'm asking just a yes or no.

21 You testified here, did you not say, sir:

22 Question: Are you familiar with Baja Ventures
23 2006?

24 Answer: Yes.

25 Question: Do you own that entity?

Kenner - Cross/Miskiewicz

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1 Answer: I don't think I do any longer.

2 Question: You don't think you do?

3 Answer: I don't think I do any longer.

4 And then you are asked:

5 What happened?

6 Answer: I believe I lost it.

7 Question: Can you explain what you mean by you
8 lost it.

9 Answer: I had a loan agreement with somebody
10 for some moneys to help pay for legal expenses and I was
11 unable to repay the loan.

12 Question: Who was the loan agreement with?

13 Answer: John Kaiser.

14 So you transferred, according to your testimony
15 in August 11th of 2010, Baja Ventures, the same company
16 that has a 39 percent stake in Diamante Cabo San Lucas.

17 Right.

18 A. That is incorrect.

19 Q. My only question is, did you or did you not say that?

20 A. I did not say that.

21 The deposition transcript is incorrect. It was
22 referring to Hawaii Ventures 2006 and the equity transfer
23 agreement.

24 Q. You are saying that the person who transcribed your
25 testimony somehow knew about miraculously a company known

Kenner - Cross/Miskiewicz

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1 as Baja Ventures which you just happened to own 39 percent
2 of, right, and substituted that word for something else
3 called Hawaii Ventures.

4 Is that what you want these people to believe?

5 A. That's, in fact, what happened.

6 MR. MISKIEWICZ: Your Honor, I'm about to begin
7 the second half.

8 THE COURT: Okay.

9 We'll reconvene at 2 o'clock. Don't discuss the
10 case.

11 (Jury leaves the courtroom.)

12 THE COURT: Everyone can be seated.

13 You can step down.

14 (Witness steps down.)

15 THE COURT: Just before the lunch break there
16 was an issue yesterday that I said I was going to come
17 back to and the court reporter reminded me this morning
18 that I didn't come back to and that was the sealing of the
19 sidebar.

20 Mr. LaRusso, you had asked that I seal that and
21 I sealed it temporarily so that you could be heard on
22 that. If you want to approach on explaining why it should
23 be sealed I'm happy to do it, but I don't believe there
24 was any reason for that to be sealed.

25 To the extent there was any privileged

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1 communication, the privilege, as you noted at the sidebar,
2 was waived by Mr. Constantine allowing you to speak to the
3 court about the issue that was raised. I don't believe
4 the public should be denied access to what you told the
5 court with respect to that, but I'll hear you if there is
6 anything you want to bring to my attention.

7 I don't know of any basis for the sealing of
8 that sidebar.

9 MR. LARUSSO: Judge, I think I made the
10 arguments at sidebar.

11 I don't think there is anything I can add that
12 will impact that decision.

13 THE COURT: As I just said, the only portion at
14 sidebar that could possibly be sealed if it was some
15 privileged communication, Mr. LaRusso disclosed to the
16 court certain interactions that occurred between him and
17 his client and stated that he discussed it with his
18 client, his client was waiving the privilege and wanted
19 the court to be aware of what occurred.

20 In any event, whether it was waived or not that
21 was brought to my attention in order to explain why there
22 needed to be a further hearing with respect to the
23 Home Depot tape and I don't believe there is any basis to
24 seal it. So it is unsealed.

25 Thank you. How much longer do you have,

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1 Mr. Miskiewicz?

2 MR. MISKIEWICZ: It will not take the full day.

3 I will probably go to the afternoon break.

4 THE COURT: You still have to play a 25-minute
5 tape though, are you including that?

6 MR. MISKIEWICZ: I will probably -- no, you are
7 right.

8 So I have that 26-minute tape. I will conclude
9 with that, I think.

10 THE COURT: All right.

11 2 o'clock.

12 (Luncheon recess.)

13 (Continued on next page.)

14

15

16

17

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21

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23

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25

Kenner - Cross/Miskiewicz

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1 A F T E R N O O N S E S S I O N

2 2 pm

3

4 (The following ensued in the absence of the
5 jury.)

6 MR. HALEY: Your Honor, briefly.

7 Shortly before the recess there was a question
8 asked of my client quite directly that began with: *Do you*
9 *expect these people to believe*, followed by the question.

10 My memory of the tone of voice that was used by
11 Mr. Miskiewicz in asking the question, at least by way of
12 my memory, was somewhat raised.

13 I did not object at that point in time, judge,
14 because it was my view that by jumping up and objecting
15 when that question was phrased in that fashion it would
16 only have exacerbated the histrionics. The only thing
17 missing from that statement was: *Do you expect these*
18 *people to believe because I sure don't*. He didn't say
19 that, Judge, but that was clearly the implication.

20 It is my position when he said *these people*,
21 he's referring to the sworn jurors in this case. And I
22 ask the court to do the following.

23 My application is simple judge. That Mr.
24 Miskiewicz be instructed not to use that kind of
25 terminology in that raised voice again, and that the court

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1 give a curative instruction as relates to whatever
2 language the court feels is appropriate.

3 I don't have the ability to cross-examine Mr.
4 Miskiewicz regarding his beliefs or his view of my
5 client's credibility; that an attorney, whatever
6 phraseology the court wishes to use, that the evidence be
7 based upon the jury's determination as to the credibility
8 of the witnesses, and views or opinions expressed by
9 attorneys representing litigants are not to be considered
10 by the jury. I again --

11 THE COURT: I'm not going to give a curative
12 instruction. As you might recall, you have asked some
13 argumentative questions of the government witnesses. I
14 didn't give any curative instructions when you asked an
15 open-ended question and you told me: I'm sorry I let my
16 emotions get the best of me.

17 Do you recall that?

18 MR. HALEY: Yes, I do.

19 THE COURT: I did not give a curative
20 instruction when you did it. If you had objected, I would
21 have sustained the objection as an argumentative question.
22 It obviously was an argumentative question. I think the
23 jury will understand that and I don't think any curative
24 instruction is needed. But I will instruct Mr. Miskiewicz
25 don't ask any questions in that style or any argumentative

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1 questions. Okay? Save it for the summation.

2 MR. MISKIEWICZ: Will do.

3 MR. HALEY: My final application, Judge, moving
4 right along.

5 Mr. Miskiewicz showed me a short while ago, and
6 I do appreciate this, a bottle. I believe he wants to
7 show this bottle to my client.

8 I'm led to believe that, at least by way of
9 proffer, it was received by the US Attorneys office,
10 presumably from Mr. Kaiser. I don't know that to be a
11 fact. I'm led to believe they will not be calling Mr.
12 Kaiser as a rebuttal witness so the US Attorney now picks
13 up this bottle and walks over, puts it on the stand and
14 says to my client: *Have you ever seen this before?* What
15 is the implication going to be as relates to that
16 particular question, judge, but that they acquired it
17 through some sort of procedure by which a witness, who may
18 or may not be recalled as a government witness. I just
19 believe that that is, again, histrionics, unduly
20 subjective, and I would simply object if that is the way
21 it is going to be done.

22 THE COURT: I assume the government has a good
23 faith basis for believing Mr. Kenner might be familiar
24 with it based upon what Mr. Kaiser has told them. Or not.
25 So it is histrionics to ask him about it if I has never

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1 seen it. If he has never seen it, he has never seen it
2 and it will go back in the box. I don't know how
3 effective that will be.

4 MR. HALEY: Maybe not, judge. I have an
5 obligation to raise what I believe to be objections.

6 THE COURT: You obviously have shown a lot of
7 documents. Again, I find it is a little bit ironic that
8 you are making these objections, because you stood over
9 witnesses with documents saying isn't it a fact that you
10 told the FBI on July 1, 2004, the following; and the clear
11 suggestion is that you are standing there with a
12 documented that says that.

13 That has the same implication even though there
14 is no FBI agent who testified that is what the document
15 says. So it is the same dynamic that I have seen over and
16 over again.

17 I don't think it an objectionable thing to show
18 something to a witness that you think the witness might
19 recognize.

20 MR. HALEY: I will never quarrel with the court.
21 I have a difference of opinion but I will never quarrel
22 with the court.

23 My only comment, Judge, is, I don't believe
24 throughout any of the questioning, I asked any questions
25 of government witnesses, I never said anything remotely

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1 approaching, in any substance, *do you expect these people*
2 *to believe*. And that was just the basis of my original
3 objection.

4 THE COURT: I said it was an objectionable
5 question. It was argumentative. I'm not sure I want to
6 grade argumentative questions as to whose is worse. An
7 argumentative question is an argumentative question. It
8 is a lawyer suggesting through argument in a question what
9 they think the jury should conclude about the answer.

10 So I am not sure that I agree that his
11 argumentative question was worse than the argumentative
12 questions that have been asked during the defense
13 cross-examination of government witnesses.

14 In any event, I will sustain any objection to --
15 I don't want you to think you are drawing attention to an
16 argumentative question. Everyone knows an argumentative
17 question, so objecting to it I don't think draws attention
18 to it. I would sustain the objection.

19 MR. HALEY: Thank you, judge.

20 THE COURT: Let's bring in the jury.

21 MR. LaRUSSO: Your Honor? We are having some
22 movement on my witnesses, but I do have three available.
23 I'm no sure yet what the order is going to be for
24 tomorrow. I told the government before we broke for lunch
25 what the order was. One of the witnesses is flying in

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1 from Chicago and I may have to put him on the stand first.

2 I don't know yet exactly what my order is going
3 to be but I now have three witness available. And,
4 believe or not, Judge, Mr. D'Ambrosio, the witness who has
5 had the patience to be here two days, I think he may even
6 have the patience to stay another day.

7 So I'm going to be moving. I don't know that
8 the moving parts are going to be until later today.

9 THE COURT: Okay.

10 (The following ensued in the presence of the
11 jury.)

12

13 **PHILLIP A KENNER**

14 called by the Defense, having been previously
15 duly sworn/affirmed, continued testifying as
16 follows:

17 THE COURT: Please be seated.

18 Go ahead, Mr. Miskiewicz.

19

20 CROSS-EXAMINATION (Continued)

21 BY MR. MISKIEWICZ:

22 Q. Mr. Kenner, you were asked during your direct
23 examination about a Rubin Paolos and money that came out
24 of the Global Settlement Fund to pay that attorney in
25 Mexico.

Kenner - Cross/Miskiewicz

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1 Do you remember those questions?

2 A. Yes, sir, I do.

3 Q. You were also asked questions about Mr. Kaiser's
4 testimony regarding your use of Global Settlement funds to
5 acquire a tequila company.

6 Do you remember being asked those questions by
7 Mr. Haley?

8 A. Could you restate the question? That was not clear
9 to me.

10 Q. Do you remember being asked questions by Mr. Haley in
11 your direct about Mr. Kaiser's testimony that you had
12 acquired a tequila company in Mexico?

13 A. I remember discussions about that topic. I didn't
14 follow the question again. I apologize.

15 Q. I'm talking now not about discussions with
16 Mr. Kaiser. I'm simply talking about your testimony.

17 Let me do it this way?

18 A. Okay. Thank you.

19 Q. You were asked what if anything about Mr. Kaiser's
20 testimony regarding tequila was false. On page 4150 your
21 answer was:

22 *Specifically, everything. In detail, I have*
23 *never possessed any of those bottles or any similar*
24 *version of those bottles that were represented on the*
25 *government's exhibit on the one-page web page that was*

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1 *designed by a friend of mine. Those bottles have never*
2 *been manufactured or any similar replica of them.*

3 Do you remember testifying in this trial to that
4 effect?

5 A. Yes, I do.

6 Q. And in fact you did possess and manufacture such
7 bottles, didn't you?

8 A. That is incorrect.

9 Q. I'm showing you Government Exhibit 4506 for
10 identification. And I'm going to ask you to focus on the
11 email address.

12 Whose email address is that?

13 A. That is an old email address of mine.

14 Q. It is an old email address of your today? Or was it
15 an old email address of yours back on the date of this
16 email?

17 A. That I believe existed in and around the date of that
18 email.

19 Q. And it is an email to, among other people, Bobby
20 Gaudet, actually two different email addresses, and John
21 Kaiser. Correct?

22 A. Yes, sir.

23 Q. And there is a photograph. Correct?

24 A. Correct.

25 Q. And it concludes: *Thanks, Phil.*

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1 You are Phil, right?

2 A. Yes, I am.

3 Q. You recognize the cell phone address?

4 A. Yes, sir.

5 Q. At the bottom there?

6 A. Yes, my cell phone address.

7 Q. You sent this email, didn't you?

8 A. I believe I did.

9 MR. MISKIEWICZ: The government moves the
10 admission of 4506.

11 MR. HALEY: No objection.

12 MR. LaRUSSO: No objection, your Honor.

13 THE COURT: 4506 is admitted.

14 (Government Exhibit 4506 in evidence.)

15 BY MR. MISKIEWICZ:

16 Q. This is sent from your iPhone on July 8, 2008. And
17 it is sent to, among others, Mr. Kaiser. Correct?

18 A. Yes, sir.

19 Q. And it is a photograph of what appears to be two
20 bottles of something. And can you read what the label
21 says on the back?

22 A. Mosquito Rojo.

23 Q. And that was the name of the company that you
24 testified in direct was merely a website created by a
25 friend of yours. Correct?

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1 A. Yes. The bottles that were on that website don't
2 represent the bottles that are here.

3 Q. Same company name. Correct?

4 A. Yes, same company name.

5 Q. And then you heard testimony in the government's case
6 that located in your home was a business card. It is kind
7 of hard to read case of the red, but the white part says:
8 *Phil Kenner, chairman*, and then the name of the website is
9 *MosquitoRojoTequilla.com*. Correct?

10 A. That is correct.

11 Q. And in fact the cell phone number on the business
12 card is the same cell phone number in your email which is
13 now 4506. Correct?

14 A. Yes, that's correct.

15 Q. You also testified in direct at page 4150, continuing
16 what was you say untrue about Mr. Kaiser's testimony, at
17 line 13.

18 Next, I don't believe I have ever been in
19 communication that I recall with a distributor friend of
20 Mr. Kaiser's who had requested bottles from me, nor have I
21 ever shipped any tequila to Mr. Kaiser either in any form
22 by UPS, FedEx, or any other OS Postal means.

23 You said that under oath, correct?

24 A. Yes, that's correct.

25 Q. Showing you what has been marked for identification

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1 as 4507.

2 Quickly, is this also a string of emails between
3 you and Mr. Kaiser at or about January 2009?

4 A. That appears to be.

5 Q. And there is a different email address but you also
6 had this email, did you not, sir: PAK33@mac.com?

7 A. That's correct.

8 Q. You sent this email and received these emails, did
9 you not, sir?

10 A. Yes, I'm part of sending and receiving these emails.
11 That's correct.

12 MR. MISKIEWICZ: The government moves for the
13 admission of 4507.

14 MR. HALEY: No objection.

15 MR. LaRUSSO: No objection, your Honor.

16 THE COURT: 4507 is admitted.

17 (Government Exhibit 4507 in evidence.)

18 BY MR. MISKIEWICZ:

19 Q. Very briefly. In this email chain, mopping other
20 things you are forwarding, are you not, to John Kaiser an
21 email from Bob Gaudet regarding -- I will read it.

22 *It has been requested for us to provide the name*
23 *and a copy of, I believe that is ID or id, for the person*
24 *who will be picking up tequila. The following is what I*
25 *had, and it goes on and has the name of somebody in*

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1 Moscow. Is that correct?

2 A. Yes. That's correct.

3 Q. Was Mr. Gaudet also a partner of yours in Mosquito
4 Rojo?

5 A. Mr. Goudet was one of the individuals interested in
6 starting the company with me. That's correct.

7 Q. Government Exhibit 4508 for identification. Is this
8 another email from you to Mr. Kaiser in or about 2008?

9 A. It appears to be.

10 Q. Phil@standardsadvisor.com. That was one of your
11 addressers back in 2008. Is that correct?

12 A. Yes. It still is.

13 Q. You sent this, didn't you?

14 A. Yes. Correct.

15 MR. MISKIEWICZ: The government moves for the
16 admission of 4508.

17 MR. LaRUSSO: May I just see that for a second?

18 MR. HALEY: No objection, your Honor.

19 MR. LaRUSSO: No objection, your Honor.

20 THE COURT: 4508 is admitted.

21 (Government Exhibit 4507 in evidence.)

22 BY MR. MISKIEWICZ:

23 Q. 4508 is an email dated July 4, 2008, to John Kaiser.

24 The subject is *Russian bottle*! Exclamation.

25 Attached to it is a photograph. Correct?

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1 A. That is correct.

2 Q. And at the bottom of the email and below the
3 photograph, again it says *Thanks, Phil*. And it has your
4 cell phone number. Is that correct?

5 A. That is correct.

6 Q. And lastly, I'm going to show you what has been
7 marked as Government Exhibit 4509. Not much left. But do
8 you recognize that?

9 A. This is a bottle that has the labels that Mr. Gaudet
10 printed on his laser printer. That's correct.

11 MR. MISKIEWICZ: Your Honor we would move
12 Government Exhibit 4509, as light it is.

13 THE COURT: Any objection?

14 MR. HALEY: No objection.

15 MR. LaRUSSO: No objection, your Honor.

16 THE COURT: 4509 is admitted.

17 (Government Exhibit 4509 in evidence.)

18 BY MR. MISKIEWICZ:

19 Q. Okay. Mr. Kaiser, Centrum loan.

20 Mr. Kenner. I'm sorry.

21 Mr. Kenner, directing your attention to chart
22 four in evidence.

23 You agree that, as represented here, four
24 players, Glenn Murray, Mr. Sydor, Mr. Rucchin, Mr. Nolan,
25 contributed the various sums of money you see here for the

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1 purpose of Honu'apo in or about 2004.

2 A. Yes. That's correct. December of 2004.

3 Q. For a total of \$3,480,000. Right?

4 A. That's correct.

5 Q. Showing you chart five. You, on behalf of the
6 players and on behalf of Little Isle IV, obtain a
7 mortgage. You basically mortgaged Honu'apo after players
8 contributed that money in July of '05. Correct?

9 A. That is correct.

10 Q. And then you obtained a mortgage. That mortgage, do
11 you remember what the total percentage and the interest
12 rate was for that mortgage?

13 A. I believe it was about 12 percent interest rate.

14 Q. Could it have been a little bit more? 12.25 percent?

15 A. It is very possible.

16 Q. Six percent plus prime, which was 6.25 at the time?

17 A. I don't recall the prime rate back in 2005.

18 Q. But at least 12 percent interest. Right?

19 A. I believe it was about 12 percent interest. That's
20 correct.

21 Q. And then of that mortgage, Honu'apo was purchased
22 using those players' various contributions and then it was
23 mortgaged. And then you took that, the proceeds of that
24 mortgage, and you distributed it as indicated below: 1.5
25 million to Propriedad and 905,000 to Ula Makika. Is that

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1 correct?

2 A. That's incorrect.

3 Q. The money didn't go to Ula Makika?

4 A. I'm sorry. 905,200.

5 Q. Did go to Ula Makika.

6 A. Yes, sir, it did.

7 Q. Now, Propriedad was a Jowdy-controlled company?

8 A. 100 percent owned, I believe, by Mr. Jowdy.

9 Q. So I mean this is part of the total \$5 million that
10 you say was loaned to Mr. Jowdy. Correct?

11 A. The net 5 million, plus or minus. That is correct.

12 Q. And the money came from lines of credit of the
13 various players we saw, Murray, Sydor, Rucchin, et cetera.
14 You saw that, right?

15 A. Yes, I did.

16 Q. And those players were paying interest whenever their
17 lines of credit were drawn against.

18 Showing you chart six. They had to pay interest
19 on those lines of credit. Correct?

20 A. Little Isle IV was paying interest. Not the
21 individuals.

22 Q. And showing you chart number six. At a time of the
23 Centrum loan at 12 percent interest, Little Isle IV had
24 \$16,000 and change in its bank account. Correct?

25 A. Yes. We typically carried a very low cash balance in

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1 the accounts.

2 Q. And in fact all the other LLCs, all of which you
3 controlled, had very low account balances. Correct?

4 A. That is correct, in lieu of draining all of the lines
5 of credit just to hold a high balance in any one of the
6 accounts for no particular reason.

7 Q. Well, there was basically no money -- you said Little
8 Isle IV paid the lines of credit.

9 But we can agree, can we not, that Little Isle
10 IV didn't have any money? The only money it had was the
11 lines of credit from the players.

12 A. Little Isle IV had access to the capital
13 contributions of all the investors.

14 Q. Which were lines of credit. Correct?

15 A. Not in its entirety.

16 Q. Except for \$100,000, maybe \$250,000, initially
17 contributed. Correct?

18 A. No, that's not correct.

19 Q. Well, in this case the only other capital it had was
20 a mortgage, approximately \$3 million, from Centrum.
21 Correct?

22 A. The Little Isle partners had contributed north of a
23 million dollars cash through this period of time and as
24 incremental capital contributions.

25 To acquire larger equity stakes, each of the

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1 line-of-credit holders made their lines of credit
2 available.

3 At no time did I drain the entire lines of
4 credits just so I could hold a high balance in the Little
5 Isle bank account. We only used the lines of credit
6 whenever necessary to pay for expenses of the company.

7 Q. My question to you is, you don't dispute the fact
8 that at the time of the Centrum loan -- on the right-hand
9 side of chart number six -- those were the relative
10 balances or those were the balances for the various
11 individuals listed there: Peca, Nolan, Berard, et cetera.
12 Right?

13 A. I don't know for a fact but they seem fairly
14 accurate.

15 Q. And so whoever, whoever you would say is paying down
16 the interest or paying the interest on those loans,
17 whether it is Little Isle IV or however you want to phrase
18 it, somebody is paying at least 6 percent interest on the
19 Peca-Nolan-Berard line of credit. Correct?

20 A. Little Isle IV was paying the interest payments on
21 the lines of credit, and the interest rates varied during
22 that period of time.

23 Q. In fact, sir, they did go up as high as 8 percent in
24 some instances and at some point in time, didn't they?

25 A. Yes, they did.

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1 I didn't have any control over the national
2 interest rate.

3 Q. No, sir. That wasn't my question. I apologize if I
4 misunderstood. I wasn't asking if you control the
5 interest rate.

6 My question is, the lines of credit as
7 determined by Northern Trust bank increased as high as 8
8 percent at various times while these lines of credit were
9 open. Isn't that true, sir?

10 A. I don't know for a fact. But I can tell you I do
11 recall them rising above 6 percent at some point in time.

12 Q. So the Centrum loan as depicted here, \$3 million, you
13 are paying 12 percent interest, that money has already
14 been borrowed from the lines of credit of the various
15 people we have seen in chart four: Murray, Sydor, et
16 cetera.

17 And now some of those same people are also
18 paying 6 percent interest on their outstanding balance of
19 their line of credit. Correct?

20 A. Little Isle IV was paying the interest payments on
21 the outstanding lines of credit pursuant to the agreements
22 with each of the individuals. We had a loan with Centrum.
23 That is correct.

24 Q. So in total, though, at least for the 3 million
25 mortgaged in this one piece of property bought with

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1 borrowed money, remortgaged and then loaned out to
2 Mr. Jowdy at 15 percent, Little Isle is actually paying 18
3 percent in total, isn't it?

4 A. The funds that were loaned to Mr. Jowdy were in fact
5 at 15 percent. That's correct.

6 Q. And Little Isle, which you controlled, is paying a
7 total, for this 3 million at least, a total of 189 percent
8 interest in two different lines of credit and the Centrum
9 loan.

10 A. The lines of credit were the invested capital of the
11 individuals. They were two separate decisions.

12 Q. My question, again, is, when you add up the 12
13 percent on the 3 million that is mortgaged, reborrowed
14 money off of Honu'apo, add that to the at least 6 percent
15 interest that the players are paying on their lines of
16 credit; 12 and 6 is 18. Right?

17 A. 12 and 6 is 18. That is correct.

18 Q. And all you were getting on behalf of your player
19 clients as the financial manager was 15 percent in return
20 for that loan to Mr. Jowdy. Right?

21 A. I viewed it as a 15 percent loan that we were only
22 going to pay 12 percent on the money, thus making a net of
23 3 percent at that point in time.

24 Q. You don't look at it as -- well, withdrawn.

25 Sir, isn't it true you were -- again, the

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1 numbers don't work. You are losing your players' money,
2 as depicted not only in this chart but all of the bank
3 records that support it and all the loan records. You are
4 losing their money. Isn't that correct?

5 A. I don't agree with that statement.

6 Q. And you are losing it because you don't care because
7 it is not your money. It is their money. Isn't that
8 correct?

9 A. That is also not correct.

10 Q. And your --

11 A. I personally guaranteed that loan to Centrum. So
12 that if something would have happened, I was on the hook
13 for \$3 million originally and then subsequently \$3.7
14 million. I believe that was at the extension in February
15 '06 when Mr. Jowdy told us he wasn't going to pay the
16 money back.

17 Q. Sir, isn't it true the only people on the hook are
18 the various people who have testified over the last six
19 weeks here who said that their portfolios that secured
20 these loans were substantially reduced when Northern Trust
21 defaulted? They are the ones on the hook, aren't they?

22 A. No. I also have over a million dollars still due to
23 me from the Hawaii project that has been unreturned as
24 well. So I'm as much on the hook as they are.

25 Q. But you still own, or don't own, 40 percent or 39

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1 percent of Diamanté Cabo San Lucas. Correct?

2 They don't own that. You do.

3 A. I'm not sure I understand the connection between the
4 two.

5 Q. You made a big killing on this money that you
6 borrowed and reborrowed from your players. You got
7 yourself a 39 percent interest in a corporation, a US
8 corporation down in Mexico. Right?

9 A. No, sir, that's not correct, because none of that
10 money is in my capital account in Mexico. My capital
11 account is accounted for between myself and Mr. Stumple
12 and Mr. Lethinen as I discussed earlier.

13 If any of those funds were my funds, they would
14 have been represented in my capital account, which they
15 are not. They are represented in Mr. Jowdy's capital
16 account in Mexico.

17 Q. Now I want to ask you some questions about
18 communicating to your clients during this period of time,
19 by that I mean all the lines of credit were open after the
20 lines of credit.

21 You testified in direct that you pretty much
22 were at the players beck and call 24/7. Do you remember
23 saying that? In sum and substance.

24 A. Yes, sir, I do.

25 Q. You were also in regular contact with the codefendant

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1 in this case, Mr. Constantine, were you not?

2 A. During what period of time?

3 Q. Until you had a falling out, whenever you date that
4 falling out to be.

5 A. I would date that falling out to be early 2010.

6 Q. Okay. But you are saying prior to that, there is no
7 question that you and he were in constant contact about a
8 great many issues. Is that correct?

9 A. I believe that would be true.

10 Q. I show you what has been offered in evidence or
11 admitted into evidence as Government Exhibit 7430. That
12 is a screen shot from your cell phone of a text message
13 back and forth between you and Mr. Constantine, is it not?

14 A. It appears to be.

15 Q. And I believe you testified on direct that
16 Mr. Constantine would frequently ask you for money during
17 your association with him. Correct?

18 A. I did testify to that.

19 Q. And this is ne of these examples where he is
20 saying -- I will just read it for the record. *Negative*
21 *\$29 in my account. \$235 in Sarah's.*

22 Who is Sarah?

23 A. I believe it was his girlfriend at the time.

24 Q. Sarah Bowers?

25 A. I don't know her last name.

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1 Q. *Dude, this is bad.*

2 And then you respond. *I have a Palms check for*
3 *you. Letter to Ethan. PK.*

4 Did you provide him money as a result of this
5 email text exchange, do you recall?

6 A. Yes, sir. I believe I did deliver him a rental check
7 for \$6,800 as a result of this text message exchange.

8 Q. I show you what is in evidence as 1737. This is a
9 Bank of America statement for Sarah Bowers. Is that
10 correct?

11 A. Yes. There is her name.

12 Q. And Tommy Constantine?

13 A. Yes, I see that.

14 Q. And just jumping to the next-to-the-last page, where
15 it says 9/19. That would be the approximate date of your
16 email exchanges with Mr. Constantine, is it not?

17 A. Yes.

18 Q. A couple of days after.

19 A. I don't see the date on the initial bubble. It could
20 have been on or about September 19 as well.

21 Q. But the subsequent bubbles, the back and forth are
22 dated, for the record, September 22, 2008. Right?

23 A. Yes. That appears to be correct.

24 Q. And the first bubble, we don't know what the date is,
25 but it does say *235 in Sarah's*.

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1 That would comport, would it not, sir, with
2 basically what is left in the account on or about that
3 same period of time. Correct?

4 A. I see that on the screen. Yes.

5 Q. So my question to you is, your relationship with
6 Mr. Constantine was such at this point that he would
7 reveal to you things this intimate, his and his
8 girlfriend's Bank of America credit card balance. Is
9 that fair and accurate?

10 A. He did on this text message. Yes.

11 Q. Well, there is a whole, I don't want to go over
12 everything but -- and would respond and from time to time,
13 help him out with a sum of money. Is that correct?

14 A. Just like I would with any of my friend who had a
15 request. Yes.

16 Q. You said you did everything you could to be
17 responsive to your clients when they had questions.

18 I show you what has been marked for
19 identification as Government Exhibit 4511. My question to
20 you is, after you have had an opportunity to look at that,
21 does that appear to be a screen or series of screen shots
22 from your iPhone?

23 A. Yes, sir, it appears to be.

24 Q. And it is between you and Jay McKee, one of your
25 hockey player clients. Correct?

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1 A. Yes, sir.

2 MR. MISKIEWICZ: The government moves for the
3 admission of 4511.

4 MR. HALEY: Your Honor I believe I have seen it.
5 May I just approach?

6 THE COURT: Sure.

7 MR. HALEY: No objection.

8 MR. LaRUSSO: No objection.

9 THE COURT: 4511 is admitted.

10 (Government Exhibit 4511 in evidence.)

11 BY MR. MISKIEWICZ:

12 Q. I'm not going to go over every bubble. But in sum
13 and substance, this is how you communicated with Mr. McKee
14 at this particular time regarding some questions he had.
15 Correct?

16 A. Yes.

17 This was on June 11, 2011. I don't believe
18 Mr. McKee was a client of mine any longer.

19 Q. Okay. And I show you Government Exhibit 4510.

20 A. Is that it regarding this exhibit?

21 Q. That's all the questions I have. Yes. Is there
22 anything else you would like to say about that?

23 A. No. I was just going to put it aside if we are done.

24 Q. Thank you.

25 A. You are welcome.

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1 Q. 4510. Do you recognize those three shots?

2 A. I have seen these before. Yes.

3 Q. Are they screen shots from your phone?

4 A. No, I don't believe they are. I believe they are
5 screen shots from John Kaiser's iPhone.

6 Q. And Mr. Kaiser -- well, my request to you is, is this
7 in fact you communicating with Mr. Kaiser on or about the
8 dates set forth herein?

9 A. Yes. I think this is text messages with Mr. Kaiser
10 complain about money he has borrowed from people and
11 referring to them as idiots.

12 Q. Well, my question is, did you in fact, insofar as
13 these are screen shots from Mr. Kaiser's phone with texts
14 to you, do they also represent your reply to him?

15 A. Yes, I believe they do.

16 MR. MISKIEWICZ: The government moves for the
17 admission of 4510.

18 MR. HALEY: No objection, your Honor.

19 MR. LaRUSSO: No objection, your Honor.

20 THE COURT: 4510 is admitted.

21 (Government Exhibit 4510 in evidence.)

22 BY MR. MISKIEWICZ:

23 Q. Very briefly. Did Mr. Kaiser have some sort of
24 nickname for you or something?

25 A. I believe this was, he probably changed my name on

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1 his phone after I sued him for trying to steal my property
2 in Arizona and the property in Sag Harbor. It appears he
3 changed it to SB2, which would have stood for Shit Bird 2.

4 Q. Slash what?

5 A. Joker.

6 Q. Meaning what?

7 A. I don't know. I never heard that one before but I
8 know he used to refer to Mr. Constantine as Shit Bird and
9 he used to refer to Mr. Jowdy as Shit bird. But I've
10 never heard that Joker until I saw these turned over
11 during evidence before trial.

12 Q. So he asks you in this, whatever that SP2
13 means/Joker: *Did you talk with Nash?*

14 That is one of your clients at that time, was
15 one of your client. Correct?

16 A. Mr. Nash was not one of my clients during this text
17 message exchange.

18 Q. But he had previously been one of your clients?

19 A. Yes, sir, he was.

20 Q. And you asked: *Not yet. Why?*

21 And I don't have to read everything in there but
22 your response is: *Don't answer.*

23 A. Mr. Nash was trying to --

24 Q. Mr. Kenner, again, your answer in this Exhibit 4510
25 is: *Don't answer.*

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1 Is that true or not?

2 A. One of the responses, correct, is *don't answer*.

3 Q. And one of the other responses is: *Do not answer*
4 *Tyson's call*.

5 A. That was also another response. Yes.

6 Q. And then it goes on.

7 A. That's correct.

8 Q. Was Mr. Kaiser in the habit of giving different
9 people nicknames?

10 A. Yes.

11 Q. Ever heard the nickname *Nervous Nick*?

12 A. No, I have not.

13 Q. Okay.

14 A. Should I have?

15 Q. I show you what has been marked for identification as
16 Government Exhibit 104.

17 May I approach counsel? I'm not sure if I have
18 copied this.

19 (There was a pause in the proceedings.)

20 BY MR. MISKIEWICZ:

21 Q. Sir, showing you 104 for identification. Is that a
22 series of emails that you sent and/or received?

23 A. It appears to be an email communication between
24 myself and Mr. Nash.

25 Q. And do you recall in fact sending this and/or

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1 receiving these emails at or about the times depicted
2 herein?

3 A. What were the dates?

4 Q. July 2010.

5 A. That sounds accurate.

6 MR. MISKIEWICZ: He government moves for the
7 admission of 104.

8 MR. HALEY: No objection, judge.

9 MR. LaRUSSO: No objection.

10 THE COURT: 104 is admitted.

11 (Government Exhibit 104 in evidence.)

12 BY MR. MISKIEWICZ:

13 Q. Sir, you also testified that there were a series of
14 transactions through a company known as Eufora. I believe
15 you were asked specifically on direct about this chart
16 which \$100,000 Michael Peca on April 7, '08, went directly
17 into Tommy Constantine's company CMG. And then
18 immediately thereafter went out a couple of days -- well,
19 on the same day another \$100,000, the same hundred
20 thousand dollars, whichever way you want to look at it,
21 went to you.

22 Do you remember testifying about this chart on
23 direct?

24 A. I recall that chart. Yes.

25 Q. And I show you another version of this, which I

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1 believe was entered into evidence. Chart 10C.

2 A. I don't recall that chart.

3 Q. You don't recall seeing this chart from

4 Mr. LaRusso --

5 A. No. I'm sorry.

6 Q. -- during cross-examination of one of the witnesses?

7 A. No. I'm sorry. I do not.

8 (Continued on the following page.)

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1 BY MR. MISKIEWICZ:

2 Q. But let me ask you this, you don't have any -- you
3 did testify that the reason you got your 100,000 directly
4 out of CMG was because you had loaned Mr. Kenner \$100,000
5 a few days before Michael Peca's money was contributed to
6 Eufora?

7 A. I'm confused. I didn't loan any money to myself.

8 Q. You said --

9 THE COURT: You said Mr. Kenner, you said you
10 loaned money to Mr. Kenner.

11 MR. MISKIEWICZ: Sorry.

12 Q. Mr. Kenner, you said on direct that a few days before
13 Mr. Peca deposited or invested \$100,000 in Eufora, in this
14 case, CMG, the reason you got back 100,000 on that day was
15 because you had previously given money to Mr. Constantine.

16 Do you recall saying that on direct?

17 A. I believe I recall that.

18 Q. Well, my question is this, sir: What's not depicted
19 here, but is in Government's 1706, bank record for CMG, do
20 you see what's highlighted there?

21 THE COURT: You have to switch the screen.

22 A. I see a picture of my head.

23 Q. Do you see what's highlighted here on 4/3, \$100,000
24 going out to, in the benefit of PEII Publishing, out of a
25 CMG account?

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1 A. Yes, I see that.

2 Q. That would have been a day after you put or loaned or
3 gave \$100,000 to Mr. Kenner -- to Mr. Constantine, sorry?

4 A. That sounds accurate.

5 Q. So actually, to complete this chart, on 4/3/08, money
6 is going to PEII, \$100,000 and you have heard the
7 testimony that PEII stands for Playboy International
8 Publishing, correct?

9 A. Yes, I believe I heard that.

10 Q. So you gave or loaned Mr. Kenner \$100,000 --

11 THE COURT: Mr. Constantine.

12 MR. MISKIEWICZ: Sorry.

13 Q. You gave or loaned Mr. Constantine \$100,000 on April
14 2, '08. Was it a loan, was it a gift, what was it?

15 A. It was an advance.

16 Q. An advance?

17 A. Mr. Constantine had asked if I could loan him
18 \$100,000 or advance him \$100,000 on that day, and I was
19 able to.

20 Q. And that money goes out to Playboy, correct?

21 A. I just saw that for the first time on his bank
22 record; yes.

23 Q. And then it's only after all of that that you
24 solicited Mr. Peca to invest \$100,000 in Eufora, or, in
25 this case, CMG, correct?

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1 A. That's incorrect.

2 Q. You would agree with me that 4/7/08 happens after,
3 not before, 4/3/08, correct?

4 A. That is correct. The transaction date did occur
5 after. I forwarded \$100,000 to Mr. Constantine, he
6 subsequently forwarded it onto Playboy Publishing.

7 Q. And you recall the testimony of Mrs. Peca, said it
8 was about this time that you indicated that to her, that
9 because you were -- because the Pecas were such a
10 long-standing client, that you were giving them an
11 opportunity to get into Eufora. Do you recall that
12 testimony?

13 A. Yes. It was a great time for any of my clients to
14 invest in Eufora, from the information I understood from
15 the company.

16 Q. So looking at it this way, actually, this 100,000
17 that goes in and comes out, it's not a return of your
18 advance, that money was already sent to Playboy, it's
19 actually just coming back to you, that fair?

20 A. Are you suggesting Mr. Constantine was supposed to
21 hold the 100,000 in his bank account until he gave it back
22 to me? I wasn't following.

23 Q. If you can't answer the question, that's fine. I
24 will redo it.

25 A. Can you redo the question, please?

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1 Q. The question is, you testified earlier on direct that
2 the only reason you got \$100,000 here was in repayment for
3 this advance, correct?

4 A. That's, in fact, what happened.

5 Q. Isn't it true, sir, that the way you got repaid was
6 by getting Mr. Peca to send money to Constantine, and
7 having Mr. Constantine send you back the money that same
8 day?

9 A. Yes, after Mr. Constantine sold his private stock in
10 Eufora, he did, in fact, wire transfer the 100,000 I had
11 previously advanced to him.

12 Q. So you have testified about that private stock
13 account in your direct. You owned and have been the
14 managing partner of numerous LLCs. You know that LLCs
15 don't issue stock certificates to people who have an
16 equity ownership stake in those corporations, correct?

17 A. Typically, that's correct.

18 Q. The only thing that -- the only document that
19 reflects whether or not somebody has an ownership stake in
20 an LLC is either the original operating agreement or an
21 amended one that reflects additions or subtractions,
22 right?

23 A. I have seen them on corporate web sites by the state,
24 various states that hold the LLCs as well.

25 Q. But what a state corporate website says is what the

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1 corporation reports to the state, correct?

2 A. Yes, I would imagine that's the source of the
3 information.

4 Q. And you testified, and I don't remember the name or
5 the number of your exhibit, but one of the Kenner exhibits
6 was a spreadsheet prepared by CR Gentry, who was at one
7 point CEO of Eufora?

8 A. I believe that's all correct, yes.

9 Q. And you testified that that spreadsheet attempted to
10 document who owned what in Eufora, right?

11 A. I believe it did document who owned what in Eufora.

12 Q. And it was -- but that's all it was, a spreadsheet,
13 right?

14 A. To the best of my understanding, that was the
15 corporate records for Eufora as to who owned what inside
16 the different equity holdings.

17 Q. There was never an operating agreement or amended
18 operating agreement prepared for Eufora that documented,
19 for instance, Mr. Privitello's ownership in the company,
20 was there?

21 A. I'm not aware. I was not an officer of Eufora at
22 this time, so I wouldn't have been involved in any of
23 those documentation processes.

24 Q. So other than the spreadsheet, you have seen nothing
25 that would tend to indicate who owned what in Eufora?

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1 A. To my understanding, that is more than satisfactory
2 to know who owned what in Eufora, since it was produced by
3 the CEO of the company at the time.

4 Q. I'm going to ask you again, other than a spreadsheet
5 created by Mr. Gentry, you have never seen any other
6 documentation, operating agreement for Eufora reflecting
7 any of the information that's in that spreadsheet, have
8 you?

9 A. Personally, I have not.

10 Q. And Mr. Gentry was CEO between sometime in 2008 and
11 July of 2009, correct?

12 A. I don't know what the life of his tenure was. I
13 thought it extended further than that.

14 Q. Well, he was essentially released in July of 2009
15 because Eufora couldn't afford him anymore, is that
16 correct?

17 A. Not that I'm aware of. I thought he was still a
18 board member through the investigation by Michael Stolper
19 and his team in or about sometime in 2010.

20 Q. My question to you is, though, you and Mr.
21 Constantine assisted Mr. Gentry in the preparation of
22 those spreadsheets, did you not?

23 A. Yes, we were few of the individuals who had the
24 information.

25 Q. Because you had been associated with Eufora years

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1 before Mr. Gentry ever got involved in the company as CEO,
2 correct?

3 A. Early on with Eufora I was involved, that's correct.

4 Q. So whatever he had in that spreadsheet was based on
5 information you and Mr. Constantine told him, right?

6 A. The information in that spreadsheet, to the best of
7 my recollection, reflected information I had given to him
8 for transactions prior to January 1 of 2005, Mr. Gaarn's
9 information from January 1, 2005 until the time the
10 spreadsheet was completed, and Mr. Constantine, with
11 respect to the complimenting information that was
12 necessary from shareholders he was associated with such as
13 himself, Mr. Edenholm, Mr. Andretti and others, Mr.
14 Kennedy and others at the time.

15 MR. MISKIEWICZ: May I approach counsel for an
16 exhibit?

17 MR. HALEY: Judge, can we approach briefly?

18 (Continued on the next page.)
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1 (Sidebar.)

2 MR. HALEY: Just for purposes of the record,
3 these are exhibits that I most certainly marked during the
4 course of Mr. Kenner's testimony and had laid from my
5 perspective the foundation. It's already occurred at this
6 point, which is fine, but are these now stipulated to be
7 into evidence? Are you consenting to them?

8 THE COURT: Some documents are being shown.

9 MR. HALEY: Correct; not formally admitted into
10 evidence. I thought it happened a couple of times.

11 THE COURT: Make sure if you are showing these
12 there won't be any objection.

13 MR. MISKIEWICZ: I haven't shown these yet or
14 the CR Gentry spreadsheets. Those are the only ones we
15 might have an objection to, or just limiting instruction.

16 THE COURT: This is basically a concession.
17 They are not going to object.

18 MR. MISKIEWICZ: These documents I don't have an
19 objection to the introduction of.

20 THE COURT: Let's do it as a group, but that's
21 the understanding.

22 MR. HALEY: Thank you.

23 MR. MISKIEWICZ: Do you have any objection?

24 MR. LaRUSSO: He can authenticate -- can you
25 authenticate those? I have information these were

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1 backdated.

2 MR. MISKIEWICZ: Mr. Gaarn testified they were
3 backdated.

4 MR. HALEY: If I may, my client testified they
5 were backdated.

6 THE COURT: Because they are backdated doesn't
7 mean they are not admissible.

8 MR. LaRUSSO: I didn't realize Mr. Gaarn
9 identified them.

10 MR. MISKIEWICZ: I don't think he identified all
11 of them. I think he identified one of the transfers.

12 THE COURT: One of them.

13 MR. LaRUSSO: Let me show them to my client. We
14 might not have an objection to any of them.

15 (Sidebar concluded.)

16 (Continued on the next page.)

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1 (In open court.)

2 THE COURT: Are you okay, Mr. LaRusso?

3 MR. LaRUSSO: I am, your Honor.

4 MR. MISKIEWICZ: At this time, your Honor, the
5 Government would concede to the admission of Kenner
6 Exhibits 224, 225, 226, 227.

7 THE COURT: Those are part of a group of
8 documents that Mr. Haley showed his client earlier. I
9 said I was holding off admitting them until Mr. Kenner's
10 cross. Mr. Miskiewicz wanted to put them up. I will
11 admit them now. I told the Government if there is any
12 document they put up to you they are deeming it admitted,
13 they will not object to it once they put it up on the
14 screen.

15 So 224 through 227 are admitted.

16 (Government Exhibits 224 through 227 received in
17 evidence.)

18 MR. MISKIEWICZ: I believe there were two
19 others.

20 THE COURT: Sorry?

21 MR. MISKIEWICZ: 224.

22 THE COURT: Through 227.

23 MR. MISKIEWICZ: Yes.

24 MR. HALEY: For purposes of the record, Mr.
25 Miskiewicz returned to me 226 -- 225 and 226 and 227,

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1 correct?

2 MR. MISKIEWICZ: Yes. I'm publishing now Kenner
3 224.

4 MR. HALEY: Thank you.

5 BY MR. MISKIEWICZ:

6 Q. Mr. Kenner, is that your signature at the bottom
7 there, on the bottom left of that document?

8 A. Yes, sir, it appears to be.

9 Q. And this is -- this purports to be a transfer of
10 membership interests of Eufora LLC to somebody else, or
11 something else, very briefly: The undersigned, Phil
12 Kenner, as managing member of Guide Dog LLC.

13 Guide Dog was your company?

14 A. Yes, sir, it was.

15 Q. A Delaware limited liability company for valuable
16 consideration, the receipt of which is hereby
17 acknowledged, hereby transfers and conveys to Standard
18 Ventures LLC, a Delaware limited liability company, all of
19 the transferor's right, title and interest in Eufora LLC,
20 an Arizona limited liability company, and all of that
21 interest being 5.67 percent of the membership interest.

22 It's dated 1st day of January 2005. Is that
23 date accurate?

24 A. January 1, 2005, yes, that was the transfer date
25 agreed upon.

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1 Q. Standard Ventures LLC, that was Mr. Gaarn's company,
2 correct?

3 A. It is Mr. Gaarn's company.

4 Q. In effect, what you have done in this agreement or
5 transfer document is you have taken whatever interest
6 Guide Dog, your company, had, that interest being 5.67
7 percent of Eufora, and you have transferred it to Mr.
8 Gaarn's company, Standard Ventures?

9 A. Yes, I did, at the time.

10 Q. And you testified during the charts, and charts
11 portion of your direct, that the reason why money flows
12 through Gaarn's bank account was, in part, he was repaying
13 you for loans previously made, is that right?

14 A. That is correct.

15 Q. And also, he was -- it was your testimony that he was
16 also selling to some of those players his interest in
17 Eufora through this membership or this transfer agreement?

18 A. Not through that transfer agreement, but in that
19 December 31st of 2008 through, I believe, May 24, 2009,
20 Mr. Gaarn sold a portion of his interest, I believe about
21 3 and a half percent of his interest, to different clients
22 of mine.

23 Q. After this December -- sorry, January 1, 2005
24 transfer, how much of a percentage did Guide Dog have in
25 Eufora?

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1 A. At the time, in Eufora itself, Guide Dog would have
2 been left with zero percent, but Mr. Constantine
3 approached me with respect to this transaction, asking me
4 to be a funding source for another LLC he was establishing
5 called Eufora Capital, in order to fund prepaid card and
6 credit card -- secured credit cards, and I was going to be
7 a 50 percent owner in Eufora Capital per to Mr.
8 Constantine's request.

9 Q. Was that ever reduced to writing?

10 A. Yes, sir, it was.

11 Q. And that is -- you became a 50 percent owner of
12 Eufora Capital, when was that?

13 A. That was in or about the same time, in 2005, when we
14 talked about Mr. Gaarn joining the company, based on his
15 vast rolodex of banking relationships and credit card
16 companies.

17 Q. Sorry, you had, at this point, 50 percent ownership
18 in Eufora Capital or something that Mr. Gaarn owned?

19 A. No, 50 percent ownership in Eufora Capital.

20 Q. Mr. Constantine's company?

21 A. No, that was a company Mr. Constantine set up, asked
22 me to fund it with respect to securitizing credit cards
23 and prepaid cards, so Mr. Constantine, through Eufora,
24 could then issue to new cardholders.

25 I was a 50 percent stakeholder in that. I

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1 believe Mr. Constantine had two other individuals who were
2 going to be 25 and 25 percent stakeholders. That was
3 established some time around the time that this transfer
4 happened with Mr. Gaarn to entice him to join the company.

5 Q. You remember Lani Donlan?

6 A. Yes, sir, of course I do.

7 Q. She testified about her essentially putting you in
8 touch with an attorney in Massachusetts by the name of
9 Steve Ross?

10 A. Yes, I recall that testimony.

11 Q. And you remember that it had to do with securing a
12 loan for Mr. Ross for the purchase of a couple of units in
13 Palms Hotel condominium units?

14 A. Through Mr. Ross?

15 Q. Through Mr. Ross.

16 A. Yes that's correct.

17 Q. Mr. Ross did make a loan to both you and Mr.
18 Constantine, did he not?

19 A. He did not.

20 Q. He did not?

21 A. He did not.

22 Q. Did you, at some point, prepare documentation or
23 secure, or guarantee a million dollar loan for Mr. Ross to
24 Mr. Constantine for the purchase of those units?

25 A. Yes, I agreed to be a guarantor on the million dollar

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1 loan to Mr. Constantine.

2 Q. And I show you what's been admitted into evidence as
3 3512. This is the beginning of that guarantee, that
4 affidavit of guarantor, correct?

5 A. It appears to be the first paragraph, yes.

6 Q. In sum and substance, it's you guaranteeing a loan to
7 Mr. Constantine in the amount of a million dollars for the
8 purpose of purchasing these condominium units, right?

9 A. It was part and parcel to Mr. Constantine's agreement
10 to sell these units to another client of mine, so this is
11 supposed to be a 30-day transaction.

12 Q. Thank you. But you signed this guarantee?

13 A. Yes, sir, I did.

14 Q. That's your signature at the end?

15 A. Yes, that appears to be my signature.

16 Q. In the first paragraph, it also says: I have
17 previously submitted an itemized and signed financial
18 statement. Right?

19 A. Yes, it does.

20 Q. You did, in fact, submit a financial statement to Mr.
21 Ross to guarantee that loan, did you not?

22 A. I would assume if it said it on there that I did.

23 Q. I show you what's admitted into evidence now as
24 Government's 3711, 3711. It is one of the financial
25 statements that are in evidence in your name, one of your

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1 financial statements. This one says as of May 2005, do
2 you see that?

3 A. I do see that.

4 Q. That would have been after your transfer of ownership
5 from Guide Dog, to Guide Dog's interest in Eufora, to Tim
6 Gaarn's Standard Ventures, correct?

7 A. That's correct. This was prepared by Bill Najam.

8 Q. Nevertheless, you were still, as of this date, going
9 back here, transfer purports to occur January 1, 2005,
10 where your 5.67 percent interest in Eufora goes to
11 Standard Venture, and here, May 2005, you are still
12 claiming on a financial statement of Mr. Ross that you own
13 5.8 percent of Eufora. Am I correct?

14 A. I see that; yes.

15 Q. It's not the only financial statement. There is
16 another one in evidence, 3513. This is dated February
17 2006. I have a lot of other real estate assets, non-real
18 estate assets. You again list 5.8 percent ownership in
19 Eufora, correct?

20 A. That's correct. I see that on there, but this also
21 was prepared by Mr. Najam during our lending process, and
22 there are a number of items on there that are incorrect.

23 Q. Then you also submitted a personal financial
24 statement to the United States Small Business
25 Administration, sometimes known as the SBA, which is in

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1 evidence as Government's 4231, as another personal
2 financial statement in your name, Phil Kenner, right?

3 A. It is my name.

4 Q. Attached to it, again, is another -- I guess looks
5 like a text, Greg, or maybe Greg, please let me know if
6 there is additional information necessary and the time
7 frame for us to acquire the loan. Thanks for the help in
8 advance. PK.

9 And at the very top, appears to have gone to
10 somebody named Greg Holst. Who is that?

11 A. The lender at First Source Bank who worked with Rick
12 Rozenboom.

13 Q. And this had to do with one of the aircraft, did it
14 not?

15 A. I believe it had to do with the Falcon 10.

16 Q. This package is dated 6th of October 2005. Do you
17 see that?

18 A. Yes, I do.

19 Q. Again, you are intending that you still own 5.8
20 percent of Eufora in this financial statement, correct?

21 A. Yes, they all would have been taken off of the same
22 financial statement of that May 2005 statement.

23 Q. And all of those were dated after the document that
24 has been offered in evidence and is in evidence as Kenner
25 224, where you transfer your ownership to Mr. Gaarn,

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1 correct?

2 A. Yes. Mr. Gentry prepared that transfer of ownership
3 interest, and Mr. Gaarn, some time in 2008, and elected to
4 date it January 1st for simplicity on the new Eufora tax
5 documents that he is refiling.

6 Q. I take it that's a "yes"?

7 A. I don't know.

8 Q. All of those financial statements are dated after the
9 transfer document to Mr. Gaarn, correct?

10 A. Yes, all dated after the transfer document Mr. Gentry
11 prepared.

12 Q. Thank you.

13 A. You are welcome.

14 Q. A couple of last things. You -- back to the
15 consulting management -- sorry, the funding consulting
16 agreement, 5104. I show you what has been marked for
17 identification as 3113. Take a look at that. Mr. Kenner,
18 do you recognize what that is?

19 A. Can I complete looking at that, please?

20 Q. Sorry, I didn't hear you.

21 A. I wanted to finish looking at it first.

22 Q. My question is: Do you recognize what kind of a bill
23 that is?

24 A. Ask it again.

25 Q. Do you recognize what kind of a bill that is you are

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1 looking at?

2 A. Yes, it appears to be American Express bill.

3 Q. Did you, in fact, at or about the time of closing
4 date here in 2005, have such an American Express account?

5 A. Yes, sir, I did.

6 Q. Was that an American Express card or account one that
7 you shared with your wife at the time?

8 A. Yes, sir, it was.

9 Q. Does this appear to be one of a monthly statement of
10 you and your wife's American Express Centurion card
11 account?

12 A. It appears to be the January 2005 statement.

13 MR. HALEY: Your Honor, I have no objection.

14 THE COURT: Any objection?

15 MR. LaRUSSO: No, your Honor.

16 THE COURT: 104?

17 MR. MISKIEWICZ: 3113.

18 THE COURT: Sorry, 3113 is admitted.

19 (Government Exhibit 3113 received in evidence.)

20 Q. You said that when you signed with or had Mr. Kaiser
21 sign, it was not on December 15, '04 it was sometime
22 thereafter when you met him in Hawaii for a due diligence
23 meeting, correct?

24 A. That is correct.

25 Q. And these American Express receipts from January of

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1 '05, a month after the date in the consulting agreement,
2 reflect travel that you made to Hawaii early in 2005,
3 isn't that correct?

4 A. Yes, I recall that travel.

5 Q. And on page 13 of 20 of what is now Government 3113,
6 there is an Aloha Air charge for \$69.70?

7 A. I see it.

8 Q. Can you travel that cheaply between Phoenix, Arizona
9 and Honolulu?

10 A. I wish you could.

11 Q. So were you in Honolulu at that time?

12 A. Yes, sir, I was.

13 Q. In fact, if we look, we can see you were there,
14 because there is beach equipment rentals in Honolulu on
15 1/16, there are pool snacks, couple of other things in
16 Honolulu, right?

17 A. Yes.

18 Q. And none of your properties in the Hawaii venture
19 were located in the island of Oahu, which is where
20 Honolulu is located?

21 A. No, sir, they were not.

22 Q. And prior to that, you were traveling to Fiji?

23 A. Yes, sir, I was.

24 Q. Prior to that, you were in Australia, weren't you?

25 A. Yes, sir, I was on the same trip.

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1 Q. So you went from Australia, to Fiji, to Oahu and the
2 State of Hawaii?

3 A. Yes, all of a matter of about two and a half days.

4 Q. Lastly, sir, there came a time when you were, as you
5 testified, had a falling out with Mr. Constantine,
6 correct?

7 A. Yes, sir.

8 Q. I believe you testified on direct that you came upon
9 Mr. Constantine in an impromptu meeting at a Home Depot in
10 Scottsdale, Arizona, correct?

11 A. I don't recall if I testified to that.

12 Q. Well, did you meet Mr. Constantine at some point at a
13 Home Depot in Scottsdale, Arizona sometime after your
14 falling out?

15 A. Yes, sir, there was an impromptu meeting on or about
16 August 2, 2010, about five months after I had stopped
17 speaking with Mr. Constantine.

18 Q. In sum and substance, sir, you had your iPhone with
19 you, and you recorded the conversation that you had with
20 Mr. Constantine at that time, did you not?

21 A. That is correct.

22 Q. And I believe you testified that you listened to the
23 recording, and what is now marked as Government Exhibit
24 4500, it appears to be a complete recording of at least a
25 portion of that meeting that you had with Mr. Constantine

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1 on that day?

2 A. I believe what I heard the other day was a portion of
3 that meeting that I recorded.

4 Q. Total recording time was how much?

5 A. Originally?

6 Q. Yes.

7 A. I believe it was 56 minutes and 33 seconds.

8 Q. You have had an opportunity to listen to Government's
9 4500, have you not?

10 A. I have listened to that recording.

11 Q. And it's shorter now, it's approximately 26 or 27
12 minutes?

13 A. Just under 27 minutes.

14 Q. But within that time frame, what is still audible on
15 this recording, it's a complete and accurate reflection of
16 your recording of Mr. Constantine and you, correct?

17 A. I believe it's exactly what I recorded and then
18 forwarded onto my attorney to share with our group of
19 investors.

20 MR. LaRUSSO: Can I ask that question be
21 clarified, whether it was the full tape or a portion we
22 were talking about?

23 Q. It was full tape?

24 A. I'm sorry, I didn't hear the question.

25 Q. Government's 4500 is this the full conversation or

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1 just the remaining or existing portion of a longer
2 conversation?

3 A. What I was given and listened to the other day, I
4 believe the 26 minutes and change, not the full recording
5 that originally was on my iPhone.

6 Q. In sum and substance, the recording stops suddenly
7 about 26 or 27 minutes, correct?

8 A. Yes, just shy of 27 minutes.

9 Q. You don't know how that happened, do you?

10 A. I don't recall.

11 Q. But everything up to that point is a true and
12 accurate recording of your conversation up to that point
13 with Mr. Constantine, correct?

14 A. Yes, what I heard I believe is accurate.

15 MR. MISKIEWICZ: Government moves for the
16 admission of 4500 and its publication to the jury at this
17 time.

18 MR. HALEY: No objection.

19 MR. LaRUSSO: Your Honor, subject to what we
20 talked about the other day, I will be pursuing that on
21 cross, but no objection subject to that.

22 THE COURT: 4500 is admitted.

23 (Government Exhibit 4500 received in evidence.)

24 THE COURT: We will take a break, and it is a
25 25-minute tape. We will take the break and then play it

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1 for you. Don't discuss the case.

2 (The jury leaves the courtroom.)

3 (Continued on the next page.)

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1 (Following a recess.)

2 THE COURT: Please be seated.

3 This is the last thing you are doing,

4 Mr. Miskiewicz?

5 MR. MISKIEWICZ: This is it.

6 THE COURT: So that should take us to 4:30.

7 MR. MISKIEWICZ: Okay.

8 Your Honor, we have prepared a transcript and
9 the attorneys for both Mr. Constantine and Mr. Kenner have
10 reviewed the transcript and they don't have any issues
11 with and we would like to move it in as an aid for the
12 jury.

13 THE COURT: Okay.

14 MR. MISKIEWICZ: I have a copy for your Honor.

15 THE COURT: Is it going to be up on the screen
16 while it's playing?

17 MR. MISKIEWICZ: No.

18 It's just a paper copy.

19 MS. KOMATIREDDY: We do have copies for the
20 jury, your Honor.

21 MR. MISKIEWICZ: Your Honor, in the courtroom
22 the acoustics are not as good as they are on a computer.

23 So may I direct or request that the jury put on
24 the headphones? Do you want to do that?

25 THE COURT: Do you think it's better with the

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1 headphones?

2 MR. MISKIEWICZ: I believe it would be, yes.

3 THE COURT: I'll tell them to put the headphones
4 on.

5 MR. MISKIEWICZ: There is a switch on the right
6 that they have to hit to turn the power on.

7 We have turned it all on, but just in case.

8 THE COURT: A switch on the right of what?

9 MR. MISKIEWICZ: The headphones and the green
10 light should come on.

11 THE COURT: Okay.

12 MR. HALEY: Is this Blue Tooth?

13 MS. KOMATIREDDY: It's all hooked up.

14 THE COURT: It will also be playing overhead?

15 MR. MISKIEWICZ: Yes.

16 MR. HALEY: If a juror doesn't hear I guess they
17 will signal.

18 MR. MISKIEWICZ: And there is a headphone for
19 Mr. Kenner.

20 MR. HALEY: Great.

21 Thank you.

22 (Jury enters the courtroom.)

23 THE COURT: Everyone can be seated.

24 MR. HALEY: Mr. Miskiewicz, no objection on that
25 exhibit.

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1 THE COURT: Mr. Miskiewicz, you have a
2 transcript you want to offer as an aid?

3 MR. MISKIEWICZ: Yes, your Honor.

4 With the consent of the defendants, the
5 government would offer 4500 T to be used as an aid to the
6 jury during the publication of this recording.

7 THE COURT: Any objection?

8 MR. LARUSSO: No, your Honor.

9 MR. HALEY: No, your Honor.

10 THE COURT: Again, the same instruction, this is
11 just an aid and to the extent you hear something different
12 on the recording it's what you hear that controls, not
13 what's on the transcript.

14 The government has advised me that the quality
15 of the recording is better through the earphones which you
16 should have on your chair. There is a switch on the right
17 ear that you need to turn it on and you will see a green
18 light. If the green light doesn't go on when you turn the
19 switch, let me know.

20 Everyone's green light is on? If for some
21 reason they start the recording it's not working just
22 raise your hand and the government going to give each of
23 you a copy of the transcript.

24 (Whereupon, Government Exhibit 4500 T was
25 received in evidence, as of this date.)

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1 MR. MISKIEWICZ: With the court's permission.

2 THE COURT: Yes.

3 Play the recording.

4 (Tape played.)

5 (Tape stopped.)

6 MR. MISKIEWICZ: Very briefly.

7 BY MR. MISKIEWICZ:

8 Q. Mr. Kenner, that occurred at a Home Depot, correct?

9 A. Yes, sir.

10 Q. And showing you Government Exhibit 3011 for
11 identification, do you recognize that bill?

12 A. Yes, I do.

13 Q. That is a Citi MasterCard in your name.

14 Correct?

15 A. Yes, it is.

16 MR. MISKIEWICZ: The government offers
17 Government Exhibit 3011 into evidence.

18 MR. HALEY: No objection.

19 MR. LARUSSO: No objection, your Honor.

20 THE COURT: 3011 is admitted.

21 (Whereupon, Government Exhibit 3011 was received
22 in evidence, as of this date.)

23 BY MR. MISKIEWICZ:

24 Q. And, very briefly, you see on August 2 there is a
25 Home Depot charge in the amount of \$27.20, you see that?

Kenner - Cross/Miskiewicz

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1 A. Yes, I see that.

2 Q. And that was the day you made this recording,
3 correct?

4 A. Yes, I believe it was.

5 Q. And showing you Government Exhibit 4501, you then
6 subsequently sent a copy of the recording to other people.

7 Is that accurate?

8 A. Could you ask the question again?

9 I didn't follow it.

10 Q. Did you subsequently send a copy of this recording to
11 other people, specifically Mr. Stolper?

12 A. Yes, I believe I sent it to Mr. Stolper within a day
13 or two of the impromptu meeting on August 2nd.

14 Q. And 4501 has a screen shot of you indicating to
15 Mr. Constantine in a text that the message that he was
16 attempting to get you to send to others in that recording
17 had been communicated.

18 Correct?

19 A. That's what it appears, correct.

20 MR. MISKIEWICZ: The government moves for the
21 admission of 4501.

22 MR. HALEY: No objection.

23 THE COURT: Mr. LaRusso, any objection?

24 MR. LARUSSO: I'm sure I saw it beforehand, but
25 can I just take a quick look at it again.

4775

1 (There was a pause in the proceedings.)

2 MR. LARUSSO: No objection, your Honor.

3 THE COURT: 4501 is admitted.

4 (Whereupon, Government Exhibit 4501 was received
5 in evidence, as of this date.)

6 MR. MISKIEWICZ: No further questions.

7 THE COURT: It's 4:30 so we'll break for the
8 day.

9 I know Mr. Hoffman, juror No. 3, your students
10 are graduating tomorrow. He also has a vacation planned
11 and I don't want you to miss, so with my deepest gratitude
12 for your service in this case I'm going to excuse him as a
13 juror in this case.

14 I want to emphasize, Mr. Hoffman, as I said to
15 the or jurors who were excused you are not permitted to
16 discuss the case or your views on the case with anybody
17 else. It would be a violation of your oath, do you
18 understand?

19 A JUROR: Yes.

20 THE COURT: I want to thank you for your service
21 and have a great vacation.

22 Mr. Macias, starting tomorrow you will be
23 sitting in the juror No. 3 chair, although I understand
24 you have a scheduling conflict next week, is that
25 accurate?

1 A JUROR: Yes.

2 THE COURT: Let me discuss that with you and
3 I'll let everybody else go so I can understand what the
4 issue is.

5 For everybody else we'll reconvene tomorrow at
6 9:30. Don't discuss the case. Don't read or view
7 anything having to do with the case and have a good night.

8 (Jury leaves the courtroom.)

9 THE COURT: Have a seat.

10 (Replacement Juror No. 3 is in the jury box.)

11 THE COURT: June 30th you have a mandatory
12 meeting at work?

13 A JUROR: Yes.

14 THE COURT: Let me just ask you this.

15 Obviously you have been serving for a long time
16 and I'm going to do everything I can to accommodate you,
17 but let me make sure I understand, would you need the
18 whole day?

19 A JUROR: It's in the afternoon, it starts at 1.

20 THE COURT: You can possibly do a half a day
21 that day?

22 A JUROR: Possibly.

23 THE COURT: Let me ask you a second question.

24 I can draft a letter or make a phone call if you
25 want me to, to communicate to your employer that even

4777

1 though it's a, quote-unquote, mandatory meeting that you
2 can't make it.

3 Most of the time when employers get a letter
4 like that they are accommodating, but I don't want to do
5 that if you think if you miss that meeting it's not good
6 for your career, but I want you to understand I'd be
7 willing to tell them that even though it's, quote-unquote,
8 mandatory you need to serve.

9 Do you want me to write that letter or do you
10 want to attend the meeting?

11 A JUROR: I think it's fine writing the letter
12 as long as I have it.

13 THE COURT: So I'll prepare a letter and I'll
14 show it to you so you are okay with it.

15 I don't want it going to your employer if you
16 are not okay with it. If there are any further issues on
17 that you can let me know.

18 A JUROR: Yes.

19 My employer just asked if it was possible, so.

20 THE COURT: As you know, anything is possible,
21 but, as you know, we are trying to accommodate everybody's
22 schedule.

23 So every even a half day, and it would be more
24 than a half day because for you to get there by 1 you
25 would have to leave by 12, so it's two and a half hours

4778

1 we'd lose most of the day and given where we are in the
2 case I don't want to lose any time if I can.

3 I'll write them the letter and you let me know
4 if they have any issues. My experience is they will be
5 fine.

6 A JUROR: I think so.

7 THE COURT: Thank you, again, and I appreciate
8 your continuing service.

9 Have a good night.

10 (Replacement Juror No. 3 leaves the courtroom.)

11 THE COURT: Everyone can be seated.

12 I didn't know whether it was my headset or not,
13 but there were probably about three sections of the
14 recording where it seemed to skip a few words, it looked
15 like there was a mechanical problem. I don't know if the
16 original recording is like that or there was something
17 with the equipment.

18 MR. MISKIEWICZ: The original recording is not
19 like that.

20 I don't know what it was.

21 THE COURT: Was it just me?

22 MR. HALEY: I heard actually exactly three as
23 well and one was rather significant.

24 THE COURT: It was right around the statement
25 regarding the, quote-unquote, bank robber.

4779

1 When you played it previously that didn't
2 happen? Why did it happen in the courtroom?

3 MR. MISKIEWICZ: I don't know.

4 I really don't know. I know it was one long
5 continuous recording. I think if we talk to one of our IT
6 people it may have been memory buffering or whatever, but
7 I really don't know what the cause of it is. I think that
8 the recording, though, is one long continuous recording.
9 There is nothing missing on the actual recording.

10 It's just the way it was playing back on the
11 computer.

12 THE COURT: Also it skipped a few words.

13 MR. MISKIEWICZ: It did.

14 MR. HALEY: I have listened to that recording
15 more times than I'd like to think, Judge, but I think the
16 transcript is accurate.

17 I don't know if we could stipulate as to the
18 authenticity of the transcript. I don't know what your
19 Honor's position in that record is.

20 THE COURT: You can talk it over with
21 Mr. LaRusso.

22 I guess if both sides stipulated the transcript
23 was accurate -- I don't know, what do you want to do,
24 Mr. LaRusso?

25 MR. LARUSSO: I did not hear it, but I'm not

4780

1 doubting it because I remember he pointed to it, on page
2 three in his first attribution, the eighth line down it
3 ends with the word us, it seems to be logical, but he
4 didn't hear that.

5 So I'd ask -- I'm going to listen to it again
6 tonight, Judge, and the other is the word vermin, I
7 believe, I heard a B, but my ears might be different, but
8 other than that I didn't any problems with the transcript
9 at all, other than the pauses.

10 THE COURT: That's what I'm talking about, I'm
11 talking about the three pauses where it came back on it
12 appeared that it skipped a few words.

13 That's what I was referring to. Again, I'm open
14 to any suggestions.

15 MR. LARUSSO: Judge, I can go back to my office
16 and listen to the copies again.

17 I don't remember the three pauses to be honest
18 with you.

19 THE COURT: I didn't mark them.
20 Did you mark them?

21 MR. LARUSSO: I marked them on my transcript.

22 THE COURT: Did anyone mark the pauses?

23 MR. MISKIEWICZ: I did not.

24 MR. HALEY: Your Honor, I think you and I had
25 the same connection.

4781

1 I do remember specifically three and I do
2 remember the particular pause when the reference to bank
3 robbery was mentioned.

4 THE COURT: But did you mark with the pauses
5 happened?

6 MR. HALEY: I did not.

7 MR. LARUSSO: Judge, on page two near the bottom
8 of the sentence starts with the whole Eufora thing was
9 done that's where one of the pauses occurred.

10 The other one was on page four, again towards
11 the bottom of the first long attribution where it says
12 everything in writing, I heard the second pause around
13 that point, and then like the court said the point dealing
14 with the car I heard that as well.

15 So I had three, Judge.

16 THE COURT: Okay.

17 One of the ways we -- first of all, listen to
18 the tape again to see if it pauses at exactly those same
19 spots or it was just a one time.

20 MR. MISKIEWICZ: Will do.

21 THE COURT: A mechanical thing, but if you
22 wanted to tomorrow morning if the defense wanted to tee up
23 those portions again and at least have the jury hear those
24 portions so they can hear the words that were skipped,
25 that would be one way of dealing with it.

4782

1 Or I could tell the jury there were three pauses
2 in the conversation, approximately three where it appears
3 that words were skipped, but they will have the recording
4 if they wish to listen to those portions they will have it
5 available to them and can replay it as many times as they
6 wish. I think those are the two options.

7 Think about it and let me know what you want to
8 do.

9 MR. HALEY: Your Honor, one quick issue.
10 Did the government hear pauses or not?

11 MR. MISKIEWICZ: In the replay here, yes.

12 MR. HALEY: I'm sorry.

13 I thought maybe their end of the technology was
14 better than ours and the jury.

15 THE COURT: Go over what you want to do
16 tomorrow.

17 Mr. LaRusso, you are going to cross Mr. Kenner.

18 MR. LARUSSO: Starting tomorrow morning, yes,
19 your Honor.

20 THE COURT: How long do you think you are going
21 to be in light of the government's cross?

22 MR. LARUSSO: Probably to the break or maybe a
23 little past that.

24 And I have witnesses, I have to go back to the
25 office and see if I can juggle.

1 THE COURT: I'm sure Mr. Haley will have a short
2 redirect.

3 MR. HALEY: That's encouraging, your Honor.
4 I do have redirect.

5 THE COURT: Again, just keep in mind where we
6 are in the trial.

7 Mr. Kenner did at times volunteer or
8 Mr. Miskiewicz gave him opportunities to explain things,
9 so I'm not sure it appeared to me he had said almost
10 everything on direct or was able to explain in the cross.
11 But I don't want to rehash everything that he testified to
12 for two and a half days.

13 MR. HALEY: I will do my best, Judge.

14 THE COURT: And then tomorrow are you still
15 juggling?

16 MR. LARUSSO: All three -- the two witnesses
17 have problems, and Mr. D'Ambrosio who has been patient for
18 the last three days looks like he'll be available either
19 later Thursday or bring him back Monday.

20 The other two I don't know the answer to. I
21 haven't had a chance to speak with them. I'll let the
22 government know what the order of witnesses are. It will
23 either be Mr. Gonchar or Mr. Stumpfel. Those are the two
24 that have scheduling problems and I'm going to work it out
25 and I'll e-mail Mr. Miskiewicz and let them know what we

1 intend to do tomorrow morning.

2 THE COURT: I have an issue tomorrow.

3 In the afternoon I'm supposed to be on a panel
4 in the Brooklyn courthouse, I thought it was later, but
5 it's at 5 o'clock which means I have to leave here about
6 3:30 to make sure that I get there. If you had a witness
7 that had to be completed tomorrow, I could miss that panel
8 and I could go to 4:30.

9 But if there is the ability to stop at 3:30
10 tomorrow --

11 MR. LARUSSO: Can I notify the court tonight or
12 tomorrow morning?

13 THE COURT: You can tell me tomorrow morning.

14 I'm going to plan to go, but I'll let them know
15 there could be an issue.

16 MR. LARUSSO: They are all out of town
17 witnesses.

18 That's what the problem is.

19 THE COURT: I know and the trial comes first.

20 MR. LARUSSO: They know that and they changed
21 their --

22 THE COURT: I'm talking about for me.

23 MR. LARUSSO: Okay.

24 THE COURT: I'll be here if the witness is an
25 out-of-town witness.

1 MR. LARUSSO: Okay.

2 MR. HALEY: Your Honor, maybe some
3 miscommunication.

4 I marked all those exhibits. I know we
5 introduced some. I know the government has some
6 objections to a select category. Maybe Mr. Miskiewicz and
7 I can find out which ones they objected to because I'm
8 going to introduce them en masse and frankly sit down as
9 relates to those exhibits assuming we have some agreement.

10 MR. MISKIEWICZ: We don't really have any
11 objections, except for the Excel spreadsheets.

12 I did cross-examine Mr. Kenner. He basically
13 testified this is a product of information he provided.
14 Mr. Constantine provided it to Mr. Gentry. It's an Excel
15 spreadsheet. I don't think it qualifies as a business
16 record. That would be our objection to that exhibit and I
17 apologize I don't remember the number of it.

18 In the alternative, if the court were to admit
19 it, I believe it's Kenner Exhibit 228, if the court were
20 inclined to admit it, we would ask a limiting instruction
21 be offered similar to other statements that have been
22 offered in evidence.

23 MR. HALEY: Your Honor, I would be offering and
24 I have no problem in terms of offering it pursuant to the
25 limiting instruction.

4786

1 I believe actually the government's cross on
2 it -- actually it opened the door to offering it. He was
3 asking about whether it was recorded and frankly now the
4 government has laid before the jury the source of the
5 information. So it might go to the weight of the document
6 but not to the admissibility.

7 THE COURT: It should come in as to Mr. Kenner's
8 state of mind.

9 Obviously he's saying he provided information
10 based on his own personal knowledge, that could be offered
11 for the truth, but I'll give a limiting instruction that
12 says to the extent Government Exhibit 228 reflects
13 information that was supplied to Mr. Kenner by Mr. Gentry,
14 it's not being offered for the truth.

15 It's being offered for the state of mind.

16 MR. MISKIEWICZ: Your Honor, it's Kenner Exhibit
17 228.

18 THE COURT: I'm sorry.

19 MR. HALEY: Unless I'm missing what
20 Mr. Miskiewicz is saying maybe I'll take this opportunity
21 because it's real late in the evening, the other exhibits
22 I offered I think the government has no objection.

23 MR. MISKIEWICZ: No objection.

24 MR. HALEY: All right.

25 MR. LARUSSO: Judge, lastly, there are three

4787

1 areas that I may ask both parties to take a look in the
2 transcript.

3 I'll send out an e-mail letting them know what
4 portions we think changes should be made and if we can
5 agree on them we can, otherwise we'll bring it before the
6 court.

7 THE COURT: You are talking about --

8 MR. LARUSSO: I'm talking about portions of the
9 transcript itself where there is a different word than
10 what's there.

11 It's very, very minor points in regard to
12 sections. It will take a short while to take a look at.

13 THE COURT: If you can't agree and you want to
14 offer a counter transcript to introduce those pages as
15 substitutes for the government's pages for which you think
16 is on there I'll let you do that too.

17 MR. HALEY: Thank you, your Honor.

18 THE COURT: Okay.

19 Have a good night.

20 (The trial was adjourned until Wednesday, June
21 24th, at 9:30 a.m.)

22

23

24

25

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